Supreme Court, U.S.
FILED
DEC 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

88-1029

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

———

YONKERS RACING CORPORATION,
Petitioner,

v.

THE CITY OF YONKERS,
Respondent,

and

UNITED STATES OF AMERICA and YONKERS BRANCH NAACP, *et al.*,
Intervenor-Respondents.

———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

———

ROBERT D. MEADE *
WILLIAM P. HARRINGTON
BLEAKLEY PLATT & SCHMIDT
One North Lexington Avenue
White Plains, NY 10601-1700
Telephone: (914) 949-2700
Attorneys for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

1138

QUESTIONS PRESENTED FOR REVIEW

1. May a state court proceeding, lacking a federal subject matter jurisdictional basis, be removed to the District Court under the authority of the All Writs Act?

2. May a state court proceeding be removed to the District Court under the authority of the All Writs Act in the absence of the circumstances permitting removal under the applicable removal statutes?

3. May the defenses to a state court eminent domain proceeding, raised in a separate proceeding as required by state law, identical to the affirmative defenses raised in the answer to the petition for condemnation, be removed to the District Court while the condemnation proceeding itself remains in the state court?

4. May a state court proceeding be removed to the District Court by a party occupying the status of a plaintiff?

5. Are the absence of federal subject matter jurisdiction or statutory grounds for removal "exceptional circumstances" permitting the application of the All Writs Act where another federal statute would otherwise apply, under the rule of *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34 (1985) as found by the Court of Appeals to uphold removal?

6. May the jurisdiction of the District Court be enlarged other than by an Act of Congress?

7. May a party be compelled, under penalty of contempt, to remove defenses to a state court proceeding?

8. May a consent decree in a federal civil rights action be enforced in such a manner as to lessen the property rights of a non-party owner of real property sought to be obtained to provide a remedy for violations committed by others?

9. Did the decision of the Court of Appeals dismiss the defenses to the proceeding upon grounds contrary to applicable state law?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
Jurisdiction Of The District Court	2
REASONS FOR GRANTING THE WRIT	7
I. REMOVAL OF A PROCEEDING CANNOT BE BASED UPON THE ALL WRITS ACT WHEN REMOVAL IS PROHIBITED BY THE APPLICABLE STATUTES	7
II. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE STATE LAW	16
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: Page

Ayers v. Watson, 113 U.S. 594 (1885) 10
Bath County v. Amy, 13 Wall. 244 (1871) 12
Board of Visitors—Marcy Psychiatric Center v. Coughlin, 60 N.Y.2d 14; 453 N.E.2d 1085 (1983) 19
City of Greenwood v. Peacock, 384 U.S. 808 (1966) 10
Chcago, Rock Island & Pacific Railroad Company v. Stude, 346 U.S. 574 (1954) 8
Commercial Security Bank v. Walker Bank & Trust Company, 456 F.2d 1352 (10th Cir., 1972) 13
Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) 7
Gerges v. Koch, 62 N.Y.2d 84, 464 N.E.2d 441 (1984) 18
Harrison-Halstead Community Group, Inc. v. Housing & Home Finance Agency, 310 F.2d 99, *cert. denied*, 373 U.S. 914 (1963) 7
Healy v. Ratta, 292 U.S. 263 (1934) 8
In Re Winn, 213 U.S. 458 (1909) 8
Jackson v. New York State Urban Development Corp., 67 N.Y.2d 400; 494 N.E.2d 429 (1986) 17
Local Number 93, International Association of Firefighters, AFL-CIO v. City of Cleveland, 478 U.S. 501 (1986) 14
Maczko v. Joyce, 814 F.2d 308 (6th Cir., 1987) 13
Mansfield, C & L.M.R. Co. v. Swan, 111 U.S. 379 (1884) 8
Marino v. Ortiz, 484 U.S. ——, 108 S.Ct. 586 (1988) 15
Mason City & Ford Dodge Railroad Company v. Boynton, 204 U.S. 570 (1907) 8
Metropolitan Life Insurance Company v. Taylor, 481 U.S. 58 (1987) 12
Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982) 15

TABLE OF AUTHORITIES—Continued

	Page
Milliken v. Bradley, 418 U.S. 717 (1974)	15
New York Public Interest Research Group, Inc. v. Town of Islip, 71 N.Y.2d 292; 520 N.E.2d 517 (1988)	19
New York State Thruway Authority v. Dufel, 129 A.D.2d 44; 516 N.Y.S.2d 981 (3rd Dept. 1987)	18
Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34 (1985)	10
People ex rel. Burhans v. City of New York, 198 N.Y. 439 (1910)	16
Phillips Petroleum Company v. Texaco, Inc., 415 U.S. 125 (1974)	8
Rizzo v. Goode, 423 U.S. 362 (1970)	14
Rosenbaum v. Bauer, 120 U.S. 450 (1887)	12
Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941)	9
Stafford v. Superior Court, 272 F.2d 407 (9th Cir., 1959)	13
State Farm Fire & Casualty Company v. Tashire, 386 U.S. 523 (1967)	13
Swank, Inc. v. Carnes, 856 F.2d 1481 (11th Cir., 1972)	13
Torrence v. Shedd, 144 U.S. 527 (1892)	12
United States Alkali Export Association v. United States, 325 U.S. 196 (1945)	11
United States v. First Federal Savings & Loan Association, 248 F.2d 804 (7th Cir., 1957)	13
United States v. New York Telephone Company, 434 U.S. 159 (1977)	13
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978)	10
West v. Aurora City, 6 Wall. 139 (1867)	10

OTHER AUTHORITIES:

28 U.S.C. 1441(a)	9
28 U.S.C. 1443	10
28 U.S.C. 1446(e)	13
28 U.S.C. § 1651	5

TABLE OF AUTHORITIES—Continued

	Page
1 *Moore's Federal Practice*, § 0.60[2-3]	12
§ 0.157[4-11]	13
§ 0.62[2-2]	8
14A *Wright-Miller-Cooper, Federal Practice & Procedure* § 3721	9
New York Second Class Cities Law, § 103	16
New York Eminent Domain Procedure Law § 204	16
New York Eminent Domain Procedure Law § 206 (D)	18
New York Eminent Domain Procedure Law § 207	17
New York Environmental Quality Review Act, 6 NYCRR §§ 617	17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. ———

YONKERS RACING CORPORATION,
Petitioner,

v.

THE CITY OF YONKERS,
Respondent,

and

UNITED STATES OF AMERICA and YONKERS BRANCH NAACP, *et al.*,
Intervenor-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 858 F.2d 855 (1988). The opinion is set forth in Appendix A(1a). The opinions of the District Court were not reported. The District Court opinions and orders are set forth in Appendix B(43a).

JURISDICTION

The opinion of the Court of Appeals was entered on September 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

28 U.S.C. §§ 1441, 1443 and 1651. New York Eminent Domain Procedure Law §§ 201-207. New York Environmental Quality Review Act, 6 NYCRR §§ 617 et seq. The text of these statutes is set forth in Appendix C (58a).

STATEMENT OF THE CASE

Jurisdiction Of The District Court

Yonkers Racing Corporation ("Raceway") submits that there was no basis for federal jurisdiction in the District Court. Neither federal question nor diversity jurisdiction are present. The subject proceeding, shown, *infra*, to have been the required method for asserting the defenses to a state court eminent domain proceeding under New York law (and based upon issues identical to the affirmative defenses raised in the answer to the condemnation petition) was removed by order of the District Court under the authority of 28 U.S.C. § 1443(a) and 28 U.S.C. § 1651 (the All Writs Act) (43a, 52a). *The proceeding did not qualify for removal under the statutes pertaining to such procedure. Federal subject matter jurisdiction was not present. The Court of Appeals found that grounds for statutory removal were not apparent but held that the All Writs Act provided a basis for removal independent of the removal statutes and created grounds for removal and federal subject matter jurisdiction heretofore unknown.*

The eminent domain proceeding commenced against property of the Raceway in the Supreme Court of the State of New York, County of Westchester, which is the event giving rise to the within proceeding, was commenced following the resolution of a civil rights action between other parties. On or about January 25, 1988, the City of Yonkers, ("City"), the United States of America and the Yonkers Branch-National Association for the Advancement of Colored People ("NAACP") entered into a Consent Decree resolving an action (80

CIV. 6761 [LBS]) brought by the latter parties against the City to enforce the provisions of 24 U.S.C. § 2000c-6; 42 U.S.C. § 2000; 42 U.S.C. § 3601 et seq. The complaint, inter alia, sought an injunction against the City to implement a system-wide plan of desegregation in the Yonkers City School District and a housing remedy plan to locate public and subsidized housing throughout the City of Yonkers. *The Raceway had never been a party to or in any way involved in that action.*

The events leading up to the Consent Decree should be briefly stated. On November 20, 1985, the District Court issued a finding, inter alia, that the City had violated both the Equal Protection Clause and the Fair Housing Act by virtue of its actions with regard to the location of sites for public and subsidized housing, and had violated the Equal Protection Clause by its role in perpetuating and exacerbating racial segregation in the Yonkers public schools. On May 28, 1986, following further proceedings, the District Court entered a Housing Remedy Order (reported at 635 F. Supp. 1588) which, *inter alia*, set forth a broad injunction against the City (Part I); directed the City to establish a municipal fair housing policy and fair housing office (Part II); directed the City to select sites for 200 units of federally-aided public housing, retaining the right to designate sites for such housing should the City fail to select sites (Part IV), and directed the City to develop a plan for additional subsidized housing (Part VI).

On December 28, 1987, the United States Court of Appeals for the Second Circuit issued an opinion (reported at 837 F.2d 1181) in which it affirmed "[t]he judgment of the district court in all respects." This Court, on June 13, 1988, denied a petition for a writ of certiorari filed by the City in Case No. 87-1686. (108 S.Ct. 2821). The petition sought review, *inter alia*, of the District Court's and Court of Appeals' holdings that the City was liable for segregated housing in Yonkers.

On January 28, 1988, the City with the approval of the City Council entered into a Remedial Consent Decree setting forth actions that the City would take "in connection with [the] consensual implementation" of Parts IV and VI of the District Court's Housing Remedy Order. Pursuant to Section I of the Consent Decree, the City acknowledged its obligation to construct 200 units of public housing and agreed, in Section 2, to provide certain designated "sites" for the location of the housing. Four privately owned parcels were designated including "Clark Street" a parking lot owned by the Raceway. In Section 4 of the Consent Decree it was agreed that the City would attempt to purchase the private sites and "in the absence of a voluntary agreement for the purchase by (or on behalf of) the City, the City will commence (or will cause to be commenced) legal proceedings to secure control over the relevant site in the most expeditious manner, including the use of the power of eminent domain."

The Raceway rejected the City's offer to purchase. The parcel is extremely important to the operations of Yonkers Raceway, as it is the only off-site parking lot owned by the corporation. It is the Raceway's position that the property was designated in an arbitrary manner without consideration of the problems inherent in the use of such a commercial site, located across the street from a racetrack and adjacent to a gasoline station, tavern and a major public highway (New York State Thruway) for housing. These problems were noted in the preliminary report of the planning expert retained by the City issued prior to the selection of the Raceway site finding that the environmental issues required further study.

On April 21, 1988, the City commenced a condemnation proceeding against the Raceway property in the Supreme Court of the State of New York, County of Westchester. Prior to commencing the proceeding, the City did not follow the procedures required by state law and failed

to hold a public hearing as required by Article 2 of the state Eminent Domain Procedure Law. The purpose of such a hearing is discussed, *infra.* In addition, the City did not conduct the environmental review required by statute as a prerequisite to condemnation.

On May 19, 1988, after answering the petition for condemnation, the Raceway commenced the within proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules in the Supreme Court, County of Westchester, seeking dismissal of the condemnation proceeding for the aforementioned failure of the City to comply with applicable law. *As recognized by the Court of Appeals, this proceeding was the required vehicle for raising defenses to the condemnation proceeding under state law* (12a-14a). *The Court of Appeals also recognized that the Article 78 proceeding was based upon ground identical to the defenses raised in the answer to the petition.* A copy of the answer is annexed as Appendix D(66a).

On May 27, 1988, the United States brought on an application, returnable on that same day, for an order compelling the City of Yonkers to petition to remove the Raceway's Article 78 proceeding (but not the condemnation proceeding) to the District Court.

It was the view of the United States that the Raceway's insistence on the due process rights provided by applicable state law was an attempt to interfere with the implementation of the Consent Decree. The government argued that the proceeding was removable pursuant to the general removal statute (28 U.S.C. § 1441[a]) and the All Writs Act (28 U.S.C. § 1651) which provides in pertinent part that the federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The Raceway, appearing in an aspect of the federal litigation commenced in 1980 for the first time, argued that only a defendant can remove, that it was the defendant under state law and that the presentation of its defenses in the required separate Article 78 proceeding did nothing to change that status.

The Raceway also emphasized to the Court the fact that there were no issues of federal law raised in the Article 78 proceeding and that consequently the requisite subject matter jurisdictional predicate for removal was lacking. A copy of the Article 78 petition is annexed as Appendix E(70a). The petition seeks to enforce rights arising under the Eminent Domain Procedure Law and the Environmental Conservation Law of the State of New York.

The City opposed the application of the government seeking to compel it to remove the Article 78 proceeding and argued that the proceeding was simply one aspect of an integral condemnation proceeding which could not be removed. Judge Leonard B. Sand disagreed and issued an order on May 27, 1988 directing the City of Yonkers, *under penalty of contempt,* to petition to remove the proceeding. The District Court also authorized the submission of an order permitting the plaintiffs in the housing suit to intervene as parties respondent in the Article 78 proceeding.

The removal petition was filed on May 31, pursuant to the general removal statute (28 U.S.C. § 1441[a]). On June 6, 1988, the Raceway moved for an order, pursuant to 28 U.S.C. § 1447, remanding the proceeding to the state court.

On June 8, 1988, after hearing arguments from the parties, Judge Sand denied the motion to remand and dismissed the Article 78 proceeding on the merits (43a). Removal was upheld by the District Court under the Civil Rights Removal Statute (28 U.S.C. § 1443) and the All Writs Act (52a). The court found that the requirements of the Eminent Domain Procedure Law were inapplicable

due to either statutory exemption or substantial compliance and that "state policy must give way when it operates to hinder the vindication of federal constitutional guarantees" (47a). These issues will be discussed in detail, *infra.*

By decision dated September 22, 1988, the United States Court of Appeals for the Second Circuit affirmed the order denying remand solely on the ground that the All Writs Act provided an independent basis for removal after expressing serious doubts whether removal was proper under the statutes pertaining to removal. Judge J. Daniel Mahoney dissented finding that removal did not lie on any basis.

The Court of Appeals affirmed the findings of Judge Sand that the City was exempt from compliance with the Eminent Domain Procedure Law and Environmental Quality Review Act or had substantially complied with such requirements.

REASONS FOR GRANTING THE WRIT

I. REMOVAL OF A PROCEEDING CANNOT BE BASED UPON THE ALL WRITS ACT WHEN REMOVAL IS PROHIBITED BY THE APPLICABLE STATUTES

Subject matter jurisdiction is not present in this proceeding. Diversity of citizenship is not present. The Raceway does not rely upon the Constitution or laws of the United States within the meaning of the applicable criteria (*Franchise Tax Board of The State of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9 [1983]). A claim that property is being taken in an eminent domain proceeding in violation of the due process rights of the owner under state law does not raise a federal question even when the program is federally subsidized (*Harrison-Halstead Community Group, Inc. v. Housing & Home Finance Agency*, 310 F.2d 99 cert. denied 373 U.S. 914 [1963]). As a defense to a state proceeding, the presence of such issues raised by

a party sued in state court does not provide a basis for removal in any event (*In Re Winn*, 213 U.S. 458, 465 [1909]). Federal subject matter jurisdiction must be based upon the allegations of the plaintiff's complaint not the defenses raised by the defendant. See the discussion of the "well pleaded complaint rule" in 1 *Moore's Federal Practice*, § 0.62[2-2] pp. 660 et seq. As discussed, *infra*, the Raceway is the defendant for all purposes under the settled decisions of this Court.

In *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884) it was declared that "the rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this Court, on its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts in the United States, in all cases where such jurisdiction does not affirmatively appear in the record . . ." See also *Phillips Petroleum Company v. Texaco, Inc.*, 415 U.S. 125 (1974) where certiorari was granted and the judgment of the Court of Appeals reversed due to the absence of federal subject matter jurisdiction.

> "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined "(*Healy* v. *Ratta*, 292 U.S. 263, 270 [1934]).

In *Chicago Rock Island & Pacific Railroad Company v. Stude*, 346 U.S. 574 [1954] & *Mason City & Fort Dodge Railroad Company v. Boynton*, 204 U.S. 570 [1907] it was held that a condemnee remains the defendant for removal purposes even though required by state law to commence a proceeding to protect its rights.

The Court of Appeals recognized that the status of the City of Yonkers precluded the removal of the proceeding: "Quite simply, a party who is in the position of a plain-

tiff cannot remove" (14a). Nevertheless the majority found an independent basis for removal under the "residual jurisdictional authority" of the All Writs Act (16a), a determination which it is submitted results in a radical expansion of the jurisdiction of the federal courts and raises novel and extremely important federal questions.

> "The right to remove a case from a state to a federal court is purely statutory and therefore is entirely dependent on the will of Congress" (14A Wright-Miller-Cooper, *Federal Practice & Procedure* § 3721).

In *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) it was declared that removal is a "right which can only be conferred by Act of Congress" and that such legislation should be strictly construed to effectuate the "Congressional purpose to restrict the jurisdiction of the federal courts on removal . . ."

The Court of Appeals, however, contrary to *Shamrock Oil*, declared that the *"Federal removal statutes" are not the "exclusive sources of removal jurisdiction"* (15a). The summary of the opinion recently published in the Second Circuit Digest by the Federal Bar Council highlights the fact that the Court of Appeals relied upon a basis for removal independant of the controlling statute—*"JURISDICTION—In exceptional circumstances the All-Writs Act, 28 U.S.C. § 1651, may be used to effectuate removal of a case from state court" (Appendix F)* (79a). The note also states that the "Court of Appeals had serious doubts whether the removal statutes provided a proper basis to compel the City of Yonkers to remove the Article 78 proceedings to federal Court" but "did not have to resolve that difficult question since the district court had asserted an independent basis for removal jurisdiction under the All Writs Act."

The basic removal criteria are set forth in 28 U.S.C. § 1441(a) which provides that a civil action "of which

the district courts of the United States have original jurisdiction may be removed by the defendant . . ." [1] The presence of federal subject matter jurisdiction in a non diversity removed case is "indispensible, and must be shown by the record . . . and cannot be waived, and the want of it will be error at any stage of the case . . ." (*Ayers v. Watson*, 113 U.S. 594, 598 [1885]).

Removal by a defendant is also a prerequisite of 28 U.S.C. § 1443, the civil rights removal statute. The substantive grounds for the application of that statute are clearly absent. The condemnation proceeding is not a civil rights case. The purpose of the statute is to permit removal in cases where state officials and those acting under them are subject to penalty if they fail to enforce discriminatory state laws (*City of Greenwood v. Peacock*, 384 U.S. 808 [1966]).

As set forth, *supra*, Yonkers Racing Corporation occupies the status of a defendant for removal purposes under the decisions of this Court. Nevertheless the District Court improperly ordered the plaintiff, City of Yonkers, to remove the defenses to the proceeding. *The absence of a federal jurisdictional basis, was emphasized by the Raceway throughout this proceeding.* See, e.g. Appendix G(85a) where counsel for the Raceway raised the argument before the District Court in support of the motion to remand.

The decision of the Court of Appeals was based upon a misapplication of a recent decision of this Court, a recognized basis for the granting of certiorari (*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 [1978]). In *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34 (1985) this Court held that the All

---

[1] A state plaintiff cannot remove a "cross-action" resulting from his invocation of state court jurisdiction (*West v. Aurora City*, 6 Wall. 139 [1867]).

Writs Act could not be applied to require that certain acts be performed when the statute applicable to the issue did not provide for such relief. Specifically it was held that a district court could not compel the United States Marshals Service to transport state prisoners to testify in a federal civil action "at least in the absence of an express finding of exceptional circumstances . . ." (474 U.S. at 43). The order was in effect a writ of habeas corpus ad testificandum which can only be directed to the custodian of a prisoner. It was also declared:

> Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act that is controlling." (*Id.* at 43)[2]

The "exceptional circumstances" envisioned by this Court in *Pennsylvania Bureau* were situations where, due to "serious security risks", the assistance of the Marshals could be compelled under the All Writs Act as an exercise of the inherent power of a federal court to conduct its affairs. This Court clearly did not want to rule out the possibility of reliance upon the All Writs Act to require the Marshals to transport a state prisoner when the state custodian for some reason could not or should not do so.

Can the All Writs Act provide grounds for removal or a federal subject matter jurisdictional basis where it does not otherwise exist? The Court of Appeals read

---

[2] At 14a the Court of Appeals cites *United States Alkali Export Association v. United States*, 325 U.S. 196 (1945) for the proposition that the " 'extraordinary power' of the All Writs Act may be invoked even when another federal statute ordinarily would govern the issues." The case does not support the reading by the Court of Appeals which is directly in conflict with *Pennsylvania Bureau*. The issue in *United States Alkali* was whether expedited appeal would lie under the Act or the regular appellate procedures pertain. In other words did the appellant qualify under the provisions of the All Writs Act. The issue was not whether the All Writs Act would override a controlling statute.

Pennsylvania Bureau to authorize the use of the All Writs Act in any situation where it is deemed imperative to compel the performance of act or reach a result not permitted by the applicable statute. Can this argument be applied to provide a basis for enlarging the jurisdiction of the district court? The clear answer is, we submit, no. *The absence of grounds for removal or subject matter jurisdiction are controlling facts not exceptional circumstances.* It is fundamental that the inferior federal courts cannot assume jurisdiction contrary to the expressed will of Congress (1 *Moore's Federal Practice* § 0.60[2-3]). This is precisely what has occurred in the removal of the defenses to a state proceeding, raising only issues of state law, by a plaintiff, against its will. The decision of the Court of Appeals completely disregards what was described in *Metropolitan Life Insurance Company v. Taylor* 481 U.S. 58 (1987) as the "century-old jurisdictional framework governing removal of federal question cases from state into federal courts . . ." requiring either federal question or diversity jurisdiction as well as voluntary action by the defendant. A judgment in an action improperly removed must be reversed for want of jurisdiction (*Torrence v. Shedd*, 144 U.S. 527, 533 [1892]).

It is also submitted that the decision of the Court of Appeals violates basic jurisdictional principles and is in direct conflict with prior decisions of this Court. In *Bath County v. Amy*, 13 Wall. 244, 249 (1871) it was held that "the writ cannot be used to confer a jurisdiction which the Circuit Court would not have without it. It is authorized only when ancillary to a jurisdiction already acquired." See also *Rosenbaum v. Bauer*, 120 U.S. 450 (1887).

The decision of the Second Circuit is also in conflict with decisions of several other circuits which have de-

cleared that the All Writs Act does not supply subject matter jurisdiction. See *Swank, Inc. v. Carnes*, 856 F.2d 1481 (11th Cir. 1988); *Maczko v. Joyce*, 814 F.2d 308 (6th Cir., 1987); *Commercial Security Bank v. Walker Bank & Trust Company*, 456 F.2d 1352, 1355 (10th Cir., 1972); *Stafford v. Superior Court*, 272 F.2d 407 (9th Cir., 1959); *United States v. First Federal Savings & Loan Association*, 248 F.2d 804, 808 (7th Cir., 1957). Such a conflict on a fundamental issue of jurisdiction warrants the grant of certiorari (*State Farm Fire & Casualty Company v. Tashire*, 386 U.S. 523, 529 [1967]).

In addition it is submitted that the decision of the Court of Appeals is such a departure from the accepted and usual course of judicial proceedings as to warrant review by this Court. The All Writs Act has historically never been given such a sweeping application. See the discussion of the statute and the minimal burdens which may be imposed thereunder in *United States v. New York Telephone Company*, 434 U.S. 159 (1977).

As previously stated only a defendant may remove. Removal exists so that a party sued in state court can decide to transfer the matter to a federal court when the jurisdictional prerequisites are present (14A Wright, *supra*, § 3721 pp. 186-87). There is no authority for an order directing a plaintiff to remove an action, let alone to remove the defenses to an action, which remains in state court. In *Chicago, Rock Island, supra*, it was stated that different aspects of a condemnation proceeding could not be separately litigated in federal and state courts. See also *1A Moore's Federal Practice*, § 0.157(4-11) at p. 108. 28 U.S.C. § 1446(e) provides that following removal "the State court shall proceed no further unless and until the case is remanded." However, in this matter the state court was required to proceed further since the condemnation proceeding remained and still remains in that venue.

The Court of Appeals stated that application of the injunctive powers of the federal court under the statutory exceptions contained in 28 U.S.C. § 2283 (the Anti-Inunction Act) would have been required to prevent the Raceway from presenting its defenses in the state court if the defenses were not removed (17a). The Anti-Injunction Act provides that certain proceedings in state court may be stayed under clearly defined circumstances. None of these statutory circumstances is present. *No relief was ever sought under this statute.* The City of Yonkers was under the legal obligation to commence the eminent domain proceeding in the state court. The Consent Decree did not (and could not) condemn the property of the Raceway. All proceedings to that end were required to be pursuant to state law.

The Court of Appeals justification for the application of the All Writs Act is submitted to be completely contrary to the decisions of this Court:

> "The fact that the petitioners were not parties to—and in their words 'had absolutely no connection with'—the underlying discrimination lawsuit is of little consequence. The Raceway and the Seminary are in a position now—whether willingly or not—to frustrate implementation of the Consent Decree. We believe this is just the sort of extraordinary circumstance envisioned by the All Writs Act." (15a).

The essential premise of the Court of Appeals that the Raceway could not assert its rights under state law flies in the face of the holding of this Court that the rights of non-parties may not be lessened by the provisions of a consent decree (*Local Number 93, International Association of Firefighters, AFL-CIO v. City of Cleveland*, 478 U.S. 501, 106 S. Ct. 3063, 3069 [1986]). It is also in direct conflict with the fundamental principle that a remedy in a civil rights case may not be awarded against a person or entity which has not been guilty of any violation of the rights of a plaintiff (*Rizzo v. Goode*, 423

U.S. 362 ([1970]); *Milliken v. Bradley*, 418 U.S. 717 [1974]). This case raises the significant issue of whether a finding that a person is frustrating the implementation of a court order, conduct within the reach of the All Writs Act (*United States v. New York Telephone, supra*, 174) can ever result when that person is interjected into a controversy in which he has no interest except to protect his own property rights. Cf. *Marino v. Ortiz*, 484 U.S. ——; 108 S. Ct. 586 (1988) where this Court was equally divided on the issue of whether non-parties could sue to challenge the provisions of a Consent Decree. The Raceway is taking no such action and is only seeking to protect its rights under the very state law the City was ordered to follow by the Consent Decree.

It should also be stated that the order under the All Writs Act was issued to the *City, not to the Raceway.* This emphasizes that the motivation of the United States in seeking the order was to find some way around the fact that the City could not remove the proceeding, not that the Raceway was in any way acting inconsistently with the Consent Decree.

The Raceway has never been a party to the underlying action and has certainly never been charged with any wrongdoing. Statements of the Court of Appeals such as "the implementation of that decree takes precedence over petitioners' desire to have the defenses to the condemnation of their properties litigated in state court" (19a) cannot provide a basis for jurisdiction.

The Consent Decree provided for state eminent domain proceedings. As this Court recently declared "minimal respect for the state process, of course, precludes any presumption that the state court will not safeguard federal constitutional rights" (*Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 431 [1982]).

II. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE STATE LAW

It is submitted that the Raceway would be entitled to review by this Court even if a jurisdictional basis existed for the proceedings below.

The power of eminent domain has been conferred upon the City of Yonkers by the New York State legislature (*New York Second Class Cities Law*, Section 103).

> "The right of eminent domain is an attribute of sovereignty which the state may grant or withhold at its will. When it delegates that right, it may impose upon the donee any condition which does not encroach upon or abridge any of the constitutional rights of those whose property is to be taken. It may require the donee of that right to do more than is demanded by the constitution, but it may not permit less to be done. If the donee accepts the right and exercises it, the conditions subject to which it is granted cannot be evaded or ignored. They are part and parcel of the grant." *People Ex. Rel. Burhans v. City of New York*, 198 N.Y. 439, 446 (1910).

Article 2 of the Eminent Domain Procedure Law (EDPL) of New York provides a detailed procedure for the holding of public hearings prior to the commencement of condemnation proceedings so that findings may be made concerning the following criteria contained in § 204 of the statute:

> "(1) the public use, benefit or purpose to be served by the proposed public project;
>
> (2) the approximate location for the proposed public project and the reasons for the selection of that location;
>
> (3) the general effect of the proposed project on the environment and residents of the locality;
>
> (4) such other factors as it considers relevant."

The failure of the City to address the issues raised by subparagraphs (3) & (4) is central to this dispute.

Section 207 of the EDPL provides for direct judicial review to the state Appellate Division of the determination and findings made after the public hearing. The statute provides that the jurisdiction of the Appellate Division "shall be exclusive" [EDPL Section 207(B)].

The New York Court of Appeals has declared that compliance with the procedures set forth in the EDPL is mandatory (*Jackson v. New York State Urban Development Corporation*, 67 N.Y.2d 400, 417-18; 494 N.E.2d 429 [1986]).

The Court of Appeals stated in *Jackson*, *supra*, p. 28 that all of the criteria of the State Environmental Quality Review Act (SEQRA) are incorporated into § 204(B)(3) of the EDPL.

No public hearings were held or findings made by the City prior to the commencement of eminent domain proceedings. The City failed to conduct any environmental review following the initial report of its consultant stating that serious environmental concerns (noise and traffic) should be studied in detail.

The Raceway site is located on Central Park Avenue, an extremely heavily traveled roadway, directly across the street from Yonkers Raceway. The New York State Thruway is located between the site and the Raceway. A gas station is situated on one side of the site and on the other side is a bar and grill frequented by many Raceway patrons into the early hours of the morning. Racing is presently held at the Raceway on a daily year-round basis in the evening with simulcasting of thoroughbred racing held in the afternoons six days a week.

The factors which make the site so appropriate for its present use make it of very questionable utility for hous-

ing. The failure to conduct environmental reviews is a significant omission under these circumstances.

§ 206(D) of the EDPL provides for an exemption from compliance with that statute when "because of an emergency situation the public interest will be endangered by any delay caused by the public hearing requirement in this Article." This provision is intended to deal with physical emergencies such as that resulting from the immediate need for sites to reroute traffic following the collapse of a highway bridge (*New York State Thruway Authority v. Dufel*, 129 A.D.2d 44; 516 N.Y.S.2d 981 ([3rd Dept. 1987])). In its decision the Court of Appeals erroneously declared that the City was exempted from compliance with the EDPL based upon the finding that the need for the housing in Yonkers created an emergency (19a-20a).

No emergency as contemplated by the statute existed. The City did not commence condemnation proceedings until three months after the execution of the Consent Decree which designated the Raceway property. This was *two* years after it was originally ordered to obtain sites for public housing. There was more than enough time to comply with the statutory requirements.

The desirability of the construction of public housing referred to by the Court of Appeals (21a) does not create an emergency within the meaning of the statute. The finding to the contrary is another application of the erroneous premise that the Raceway can be penalized for the misconduct of the City. Incidentally, contrary to the claim of the Court of Appeals, the New York Court of Appeals did not find that the City of New York was exempt from compliance with environmental statutes in *Gerges v. Koch* (21a). In *Gerges*, the City of New York declared that the project would not have an environmental impact as permitted by the applicable statute. The New York Court of Appeals found the record insufficient

to review the propriety of that determination (62 N.Y.2d at 93-94).

In *Marcy Center v. Coughlin*, cited by the Court of Appeals (21a), New York's highest court emphasized the distinction between taking allowable action to provide temporary relief for an emergency situation and seeking complete exemption from the environmental laws for a permanent facility (60 N.Y.2d, at 20-21).

There was absolutely no proof in the record to support the finding of the Court of Appeals herein that preliminary federal environmental studies had been performed sufficient to satisfy the requirements of New York law. There was thus no basis for the finding of the Court of Appeals that there had been "substantial compliance with the requirements of the EDPL in this case" (22a-23a). There was no proof as to the substance or content of any such studies.

The Court of Appeals also found that an exemption existed under a regulation providing that "civil or criminal enforcement proceedings" are not required to comply with SEQRA (24a; 64a).

This provision is inapplicable on its face. This is not a proceeding to require the Raceway to comply with the environmental laws. The statute clearly pertains only to such situations so that duplicative environmental studies are not required prior to corrective action taken pursuant to environmental studies which were the basis for the enforcement proceedings itself. See *New York Public Interest Research Group, Inc. v. Town of Islip*, 71 N.Y.2d 292, 303-4; 520 N.E.2d 517 (1988).

It is respectfully submitted that the determination of the important issues raised by the Raceway in the Article 78 proceeding as a defense to the condemnation was so contrary to settled state law, as declared by New York's highest court, as to warrant review by this Court.

CONCLUSION

This Court should review this case because of the significant increase of the jurisdiction of the district courts, contrary to the expressed will of Congress, resulting from the decision of the Court of Appeals; the conflict between decisions of this Court and the subject determination concerning the removal jurisdiction of the district courts and the scope of the All Writs Act and the conflict between applicable New York precedent and the determination of the Court of Appeals on important issues of state law.

Respectfully submitted,

ROBERT D. MEADE *
WILLIAM P. HARRINGTON
BLEAKLEY PLATT & SCHMIDT
One North Lexington Avenue
White Plains, NY 10601-1700
Telephone: (914) 949-2700

Attorneys for Petitioner

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1504, 1505 August Term, 1987

(Argued: July 20, 1988 Decided: Sep. 22, 1988)

Docket Nos. 88-6140, -6146

YONKERS RACING CORPORATION and ST. JOSEPH'S SEMINARY AND COLLEGE
Petitioners-Appellants,

v.

CITY OF YONKERS
Respondent-Appellee,

and

UNITED STATES OF AMERICA and
YONKERS BRANCH, NAACP, *et al.*,
Intervenors-Appellees.

Before: ALTIMARI and MAHONEY, *Circuit Judges*, and KORMAN, *District Judge.**

---

* The Honorable Edward R. Korman, United States District Court for the Eastern District of New York, sitting by designation.

Appeals from an order denying petitioners-appellants' motions to remand to state court, following removal, Article 78 proceedinsg commenced in the Supreme Court of the State of New York, Westchester County and from an order denying and dismissing on the merits petitions for relief pursuant to Article 78, entered in the United States District Court for the Southern District of New York (Leonard B. Sand, *Judge*).

Affirmed in part, vacated and remanded in part. Judge Mahoney dissents in a separate opinion.

ROBERT D. MEADE and MICHAEL J. TRAINOR, White Plains, New York (Bleakley & Schmidt, White Plains, New York, of counsel), *for Petitioners-Appellants.*

MICHAEL W. SCULNICK, New York, New York (Stanley R. Strauss, Vedder, Price, Kaufman, Kammholz & Day, New York, New York; Paul W. Pickelle, Corporation Counsel, City of Yonkers, Yonkers, New York; Rex E. Lee, Carter G. Phillips, Mark D. Hopson, Gary I. Resnick, Sidley & Austin, Washington, D.C., of counsel), *for Respondent-Appellee.*

LINDA F. THOME, Attorney, United States Department of Justice, Washington, D.C. (Wm. Bradford Reynolds, Assistant Attorney General, David K. Flynn, Attorney, Department of Justice, Washington, D.C., of counsel), *for Intervenor United States of America.*

MICHAEL H. SUSSMAN, Counsel, Yonkers Branch, NAACP, Yonkers, New York (Sussman & Sussman, Yonkers, New York, of counsel), *for Intervenors Yonkers Branch, NAACP, et al.*

ALTIMARI, *Circuit Judge*:

These two separate appeals, which we have consolidated for purposes of this opinion, follow from the housing remedy portions of a prior judgment, entered in the United States District Court for the Southern District of New York (Sand, *J.*), finding the City of Yonkers

(the "City" or "Yonkers") liable for a pattern and practice over a span of forty years of deliberately concentrating federal subsidized low income housing in the southwest quadrant of Yonkers in order to maintain racial segregation, and ordering Yonkers, *inter alia*, to provide sites for 200 units of public housing in non-minority areas of the city. *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985), and Housing Remedy Order, 635 F. Supp. 1577 (S.D.N.Y. 1986), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988).

This case concerns the consent decree ("Consent Decree") reached between the City of Yonkers, the United States and the Yonkers chapter of the National Association for the Advancement of Colored People (NAACP) designating 7 public housing sites for 200 units of housing east of the Saw Mill River Parkway. Two of these sites currently are owned by petitioners-appellants Yonkers Racing Corporation (the "Raceway") and St. Joseph's Seminary and College (the "Seminary"), respectively. Pursuant to the terms of the Consent Decree approved by the Yonkers city council (the "City Council") and entered by the district court on January 28, 1988, the City initiated, under pain of contempt, condemnation proceedings in state court against the Raceway and Seminary sites. Thereafter, the Raceway and the Seminary filed separate petitions against the City in the Supreme Court of the State of New York, Westchester County, pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR), seeking to enjoin the condemnation of their respective properties. On May 27, 1988, Judge Sand ordered the City of Yonkers to remove the Article 78 proceedings to the district court.

The Raceway and the Seminary appeal from an order denying their motions to remand the Article 78 proceedings back to state court and from an order dismissing their Article 78 petitions on the merits. The

district court held that removal was authorized under the federal removal statutes, 28 U.S.C. §§ 1441, 1443, and the All Writs Act, 28 U.S.C. § 1651. In addition, the court determined that the extraordinary nature of the proceedings warranted application of statutory exemptions from the notice, hearing and review requirements of the New York Eminent Domain Procedure Law (EDPL) and from the provisions of the State Environmental Quality Review Act (SEQRA). The district court also found that, even if such exemptions did not apply, there was such substantial compliance with the notice, hearing and review provisions of state law that petitioners' statutory rights were not violated. Finally, the district court considered the Seminary's first and fourteenth amendment free exercise challenge to the taking of its property and held that, since the inclusion of the Seminary's property was an integral part of the Consent Decree and thus essential to efforts designed to remedy racial segregation in housing, no valid claim for a violation of the first amendment had been advanced.

On appeal, the Raceway and the Seminary principally contend that removal was improper under the federal removal statutes and the All Writs Act since only a defendant is permited to remove and the City of Yonkers was a plaintiff, not a defendant, in the underlying condemnation proceedings. Petitioners further contend that not only are the exemptions to the EDPL and SEQRA inapplicable but that full compliance with the notice, hearing and review provisions of the statutes is required. The Seminary separately argues that the district court erred in rejecting its free exercise defense to the condemnation of its property without the benefit of a hearing to determine whether other reasonable alternatives exist to the taking of religiously owned and used property.

For the reasons that follow, we affirm the district court's order denying petitioners' motions to remand for

lack of federal removal jurisdiction, but solely on the authority of the All Writs Act. We also affirm the court's order dismissing the Article 78 petitions in all respects except with regard to the Seminary's first amendment challenge to the taking of its property which is remanded to the district court for further consideration.

BACKGROUND

The underlying facts of the Yonkers litigation are set forth in exhaustive fashion in Judge Kearse's recent opinion affirming the district court's finding of liability against the City under both Title VIII of the Civil Rights Act of 1968 (the "Fair Housing Act"), 42 U.S.C. § 3601 *et seq.*, and the equal protection clause of the fourteenth amendment, and therefore need not be restated here. For our purposes, it suffices simply to emphasize that this court concluded, as did Judge Sand, that " 'the extreme concentration of subsidized housing that exists in Southwest Yonkers today is the result of a pattern and practice of racial discrimination by City officials, pursued in response to constituent pressures[,] to select or support only sites that would preserve existing patterns of racial segregation, and to reject or oppose sites that would threaten existing patterns of segregation.' " 837 F.2d at 1194 (quoting 624 F. Supp. at 1373).

To remedy the statutory and constitutional violations, the district court in part ordered the City to fulfill its pre-existing commitment with the Department of Housing and Urban Development (HUD) to provide sites for 200 units of public housing east of the Saw Mill River Parkway funded by HUD's Community Development Block Grant program. 635 F. Supp. at 1580. Following this court's affirmance of the housing remedy order, the City, in January 1988, entered into extensive negotiations with the Department of Justice and the NAACP concerning compliance by the City with its obligation under the Housing Remedy Order to designate public housing sites.

Under threat of contempt sanctions by the district court for noncompliance with the Housing Remedy Order, the City eventually reached an agreement with the Department of Justice and the NAACP designating 7 sites on which to build a total of 200 units of public housing. The agreement was incorporated into the Consent Decree which required the City to initiate eminent domain proceedings, if necessary, to acquire these sites within 60 days. As part of the Consent Decree, HUD was to review and approve the housing sites while the City was in the process of acquiring title to the 4 designated properties which were privately owned. Within 80 days of the entry of the decree, final HUD approval was to have been obtained and the City was to have solicited proposals from developers for construction of the housing.

Two of the privately owned properties included the Raceway site, a 1.2-acre parcel now used as a parking lot and currently slated for 24 units of housing, and the Seminary site, a 2-acre parcel on the border of the Seminary's 44-acre property and also currently slated for 24 units of housing. On January 25, 1988—the date that the City reached agreement with the United States on the Consent Decree—the Roman Catholic Archdiocese of New York on behalf of the Seminary issued a statement concerning the designation of the Seminary site:

> The Archdiocese of New York has been informed that there has been a recent decision to build units of affordable housing upon property now belonging to the Archdiocesan Major Seminary, Saint Joseph's, in the Dunwoodie section of Yonkers. Since it has been decided to proceed with these plans, the Archdiocese will do everything possible to promote the success of the effort . . . .

Advised of the Cardinal's intent to facilitate the construction of public housing on the Seminary site, Judge Sand welcomed the Church's participation and support. A month later, the City of Yonkers, pursuant to the

terms of the Consent Decree, made offers of purchase to the owners of each privately owned site; the Archdiocese rejected the City's offer on March 18, 1988. On March 21, John Cardinal O'Connor wrote to Judge Sand stating that while the Archdiocese supported the addition of public housing in Yonkers, it believed there were "serious problems in the current plan." Cardinal O'Connor expressed concern that four of the seven housing sites would be located in one parish in southeast Yonkers. The Cardinal also objected to the public perception that he had "volunteer[ed]" the Seminary site. His Eminence explained that he had decided in January to " 'yield graciously' " to the City, apparently believing (albeit erroneously, as it later became apparent) that the Seminary site would be condemned with or without his consent.

The district court responded by suggesting that the City and the Archdiocese consider substituting an alternate site in place of the Seminary property. In the interim, the court ordered the City of Yonkers to initiate eminent domain proceedings against the Seminary as well as against the Raceway, which also had rejected the City's offer to purchase its property. On April 24, 1988, two days after the City filed condemnation petitions in state court, the Cardinal declared that the Consent Decree was "fatally flawed." In addition, he said he was "deeply resentful" of the process which led to the condemnation action and which put the Archiocese in the "humiliating position" of being perceived as "so resistant to making the property available that the court had to require the city to condemn the property."

The City of Yonkers then attempted to vacate the Consent Decree on the basis of a "mutual mistake" between the City Council and the Archdiocese. In support of its motion to vacate under Fed. R. Civ. P. 60(b) dated May 2, 1988, the City argued that the Cardinal's endorsement of the Consent Decree and his willingness to sell the Seminary site had been essential to the City's ap-

proval of the decree—the support of the Catholic Church being critical in order to achieve acceptance of the housing plan by the City's residents, a substantial proportion of whom are Catholic. At oral argument on the motion to vacate, the district court determined that while the Cardinal's support for the Consent Decree had been a "welcome occurrence," it had not been so crucial that his subsequent withdrawal of support was sufficient to invalidate the decree. In any event, the court noted that, even assuming there had been a mistake, the proper cause of action for the City was simply to propose a modification of the Consent Decree designating an alternative to the Seminary site. Judge Sand thereupon directed the City to meet with the Archdiocese to see if some accommodation could be reached.

Meanwhile, the Seminary and the Raceway filed answers with affirmative defenses to the condemniation petitions, and on May 11, 1988, instituted Article 78 proceedings against the City claiming that the proposed condemnations were "null and void." The parties also sought injunctive relief preventing the City from acquiring the two sites. By the end of May, once it became clear that the City and the Archdiocese had failed to reach any agreement regarding the designation of an alternate housing site and that the City Council would not propose any modification of the Consent Decree, the United States filed an order to show cause in the district court seeking removal of the Article 78 proceedings from state court. On May 27, 1988, the district court granted the order directing the City to remove the Article 78 proceedings to federal court and permitted the United States and the NAACP, plaintiffs in the underlying civil rights litigation, to intervene as respondents.

In ordering removal of the Article 78 proceedings, the district court explained:

> During the informal discussions which preceded entry of the consent decree, the question was raised

> whether [the] condemnation proceedings should be commenced in [the district] court or in state court. It was then the understanding of the parties that the sole issue which would be present in the condemnation proceedings related to value, that is, the amount to be paid to the property owner whose land was condemned by the City of Yonkers in implementation of the housing remedy order. It was with that understanding and intention that the consent decree did not contain a provision requiring that the condemnation proceedings go forward in [the district] court. . . .

Judge Sand also found a "significant risk" if removal were not ordered that the City of Yonkers "[would] be confronted with inconsistent orders from two courts [—] . . . an order of [the district] court to proceed with the condemnation of the two properties, and an order of [the] state court either not to proceed with that condemnation or to proceed pursuant to [procedures] and a timetable . . . inconsistent with [that] established by [the district] court." While the All Writs Act was, according to Judge Sand, to be invoked only as a "last resort," the court determined that, rather than allow the parties to go forward in state court knowing full well that there would be resort to the district court for injunctive relief against the implementation of any state court order inconsistent with the Consent Decree, the "more appropriate procedure" was for the district court to exercise removal jurisdiction over the Article 78 proceedings in the first instance. In sum, the court characterized the Article 78 proceedings as a "classic case" for invocation of the All Writs Act to effectuate removal.

Following removal, petitioners filed motions to remand the Article 78 proceedings to state court. On June 8, 1988, the district court heard argument from counsel on the motions to remand, the merits of the Article 78 proceedings and the City's motion to vacate the Consent

Decree. With regard to the motions to remand, the court held that removal was authorized under the general federal removal statute, 28 U.S.C. § 1441, the civil rights removal statute, 28 U.S.C. § 1443, and the All Writs Act. The court further stated that removal was appropriate because the petitioners' defenses to the condemnation were best litigated in federal court with the benefit of an existing record, that removal would not deprive petitioners of their right to be heard on the merits of their Article 78 petitions, and that removal would eliminate the possibility of inconsistent orders from two courts.

On the merits of the Article 78 petitions, the district court concluded that the "emergency situation" provision of section 206(D) of the EDPL applied in the instant case to exempt the City of Yonkers from compliance with the notice, hearing and review requirements of the statute, and that the proposed condemnations were exempt from SEQRA pursuant to the court order provisions of SEQRA's implementing regulations. 6 NYCRR § 617.2 (q). Moreover, according to the district court, the process by which the public housing sites were designated and reviewed constituted substantial compliance with the purpose of the notice, hearing and review requirements of state law.

As for the Seminary's free exercise challenge, the district court indicated that aside from the issue of the validity of the Seminary's claim of a protectible religious purpose for the two-acre site under the first amendment, the alleged interference with the pastoral contemplative atmosphere of the only seminary in the Archdiocese had to be balanced against the need to vindicate the federal constitutional rights of those citizens of Yonkers who have been denied fair housing. In striking the balance in favor of vindication of fair housing rights, the court found the inclusion of the Seminary site in the Consent Decree to be essential.

Accordingly, the district court denied petitioners' motions to remand and the City's motion to vacate the Consent Decree,[1] dismissed the Article 78 petitions, and ordered the Seminary and the Raceway to "present to [the state c]ourt a proposed order stating that, insofar as all substantive grounds for objection to the proceedings in question have been . . . resolved in [federal c]ourt, . . . the eminent domain proceedings shall go forward in accordance with State law . . . to determine the sole remaining issue of valuation of [the] properties."

DISCUSSION

I. JURISDICTION

A. The Removal Statutes

Section 1441(a) of Title 28 provides in pertinent part that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the *defendant* . . . , to the district court . . . for the district . . . where such action is pending" (emphasis added). The civil rights removal statute, 28 U.S.C. § 1443(2), provides in pertinent part that any civil action commenced in state court "[f]or any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law" may be removed "by the *defendant* to the district court . . . for the district . . . embracing the place wherein it is pending" (emphasis added).

The initial question to be considered on this appeal is whether the City of Yonkers was correctly deemed by the district court to be a defendant for removal purposes under either statute. Appellants argue that Yonk-

---

[1] The City of Yonkers has not sought appellate review of the denial of its motion to vacate the Consent Decree and indeed is precluded from doing so under the terms of that decree.

ers was not a proper party to petition the state court to remove the Article 78 proceedings since it was the plaintiff in the underlying condemnation proceedings, and the Article 78 proceedings were merely state law procedural vehicles for raising defenses to the condemnation petitions. *See Matter of Piotrowski v. Town of Glenville*, 101 A.D.2d 654, 475 N.Y.S.2d 511, 512 (3d Dep't 1984) (defenses to condemnation action are properly brought via an Article 78 proceeding); *but cf. Town of Coxsackie v. Denver*, 105 A.D.2d 966, 482 N.Y.S.2d 106, 107 (3d Dep't 1984) (challenge to condemnation may be made by an answer in that proceeding). In this regard, appellants cite two Supreme Court decisions, *Mason City & Fort Dodge R.R. v. Boynton*, 204 U.S. 570, 579-80 (1907) and *Chicago, Rock Island & Pac. R.R. v. Stude*, 346 U.S. 574, 580 (1954), for the proposition that, regardless of the state's procedural provisions, where a party seeks to remove a condemnation proceeding to federal court, the condemnor is the plaintiff and the condemnee is the defendant.

The United States and the NAACP [2] intervenors herein, responded by pointing out that the actions removed from state court were the Article 78 proceedings, not the underlying condemnation proceedings. Indeed, the condemnation actions are still pending in state court. In the Article 78 proceedings, the City of Yonkers clearly was the defendant. Intervenors argue that the Article 78 actions were separate proceedings from the condemnation

---

[2] In the district court, the City of Yonkers opposed Judge Sand's assertion of removal jurisdiction over the Article 78 proceedings. In its brief on appeal, the City has again questioned whether the district court properly "divest[ed] the New York Supreme Court of jurisdiction to resolve the Article 78 proceedings." City of Yonkers Brief at 8. Nevertheless, because in the City's view "it would be wasteful to require the matters to be relitigated in the state court," *id.* at 9, the City has argued on appeal in favor of an affirmance on the jurisdictional issue as well as on the disposition of the merits of the Article 78 petitions.

actions and that the *Mason City* and *Chicago, Rock Island* decisions are distinguishable.

Both Supreme Court decisions cited by appellants involved Iowa eminent domain statutes under which the condemnee was required to initiate a proceeding contesting the assessment of the condemned property's value arrived at by a sheriff's jury. In that separate proceeding, the condemnee was the plaintiff under state law. In each case, the Supreme Court held that in construing the removal statute, federal law determined who was the plaintiff and who was the defendant, *Chicago, Rock Island*, 346 U.S. at 580; *Mason City*, 204 U.S. at 579; *see Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104 (1941) (state procedural law cannot supersede privilege of removal granted by federal statute), and that the condemnor remained the plaintiff for purposes of removal.

Intervenors contend that the Article 78 proceedings were fundamentally different from the state court actions in *Mason City* and *Chicago, Rock Island*, which constituted challenges to property valuations. Their argument essentially is that the issues decided in the removed Article 78 proceedings—whether the City complied with state procedural requirements, whether the sites were properly designated, and whether the condemnation of the Seminary site violated the first amendment—were separate issues resolvable apart from the question of the valuation of appellants' properties, the sole remaining question in the condemnation actions. On the other hand, as appellants persuasively point out, the defenses they raised in their answers to the condemnation petitions were identical to their claims in the Article 78 petitions.

In view of the foregoing, we have serious doubts in light of *Mason City* and *Chicago, Rock Island* whether the removal statutes provided a proper basis to compel the City of Yonkers to remove the Article 78 proceed-

ings to federal court. Quite simply, a party who is in the position of a plaintiff cannot remove. *Cf. White v. Wellington*, 627 F.2d 582, 586 (2d Cir. 1980) ("right to remove is statutory, jurisdictional and absolute"). Nevertheless, we need not resolve this difficult question since the district court asserted an independent basis for removal jurisdiction under the All Writs Act. We turn now to consideration of removal under that statute.

B. The All Writs Act

The All Writs Act (the "Act") provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act "authorizes a federal court in exceptional circumstances to issue such orders to persons 'who, though not parties to the original action or engaged in wrongdoing, are *in a position to frustrate* the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice.'" *Benjamin v. Malcolm*, 803 F.2d 46, 53 (2d Cir. 1986) (emphasis added) (quoting *United States v. New York Telephone Co.*, 434 U.S. 159, 174 (1977) (citations omitted)); *cert. denied*, 107 S. Ct. 1358 (1987). Although the Supreme Court has indicated that the All Writs Act, as a "residual source of authority," ordinarily does not empower federal courts "to issue ad hoc writs" to circumvent compliance with a statute that "specifically addresses the particular issue at hand," the Act may be invoked "to fashion extraordinary remedies when the need arises." *Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985); *see United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 201-04 (1945) ("extraordinary power" of All Writs Act may be invoked even when another federal statute ordinarily would govern the issue).

Petitioners maintain that the federal removal statutes are the exclusive sources of removal jurisdiction. We disagree. In *Pennsylvania Bureau of Correction*, the Supreme Court expressly left open the question of the availability of the All Writs Act in exceptional circumstances to issue the writ when traditional statutory procedures clearly are inadequate. *See* 474 U.S. at 43. In this case, the district court was confronted both with the need to vindicate the constitutional rights of those in Yonkers who have been denied fair housing and the very real possibility that the City of Yonkers would be subjected to inconsistent orders from the state court and the federal court. *Cf. Alkali*, 325 U.S. at 203 ("asserted conflict" between jurisdiction of federal court and that of government agency warranted exercise of power of All Writs Act to issue writ of certiorari in order to obtain review of interlocutory order). The Supreme Court has made clear "the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *New York Telephone Co.*, 434 U.S. at 172; *accord Pennsylvania Bureau of Correction*, 474 U.S. at 40.

The obligation of the City of Yonkers under the Constitution of the United States to remedy violations of civil rights is paramount. *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 18-20 (1958); *Brown v. Board of Educ. II*, 349 U.S. 294, 300-01 (1955). The fact that petitioners were not parties to—and in their words "had absolutely no connection with"—the underlying discrimination lawsuit is of little consequence. The Raceway and the Seminary are in a position now—whether willingly or not—to frustrate implementation of the Consent Decree. We believe this is just the sort of extraordinary circumstance envisioned by the All Writs Act.

This court previously has held that the All Writs Act enables a federal court in an exceptional case to exercise its "residual jurisdictional authority" to issue orders against non-parties to a civil rights action in order to vindicate the constitutional rights of existing parties. *See Benjamin v. Malcolm*, 803 F.2d at 53. In *Benjamin*, we affirmed an order of the district court joining, as third-party defendants pursuant to Fed. R. Civ. P. 19(a) and the All Writs Act, state officials who were " 'in a positio to frustrate the implementation of a court order' " to alleviate overcrowding in New York City's detention center on Rikers Island. *Id.* (quoting *New York Telephone Co.*, 434 U.S. at 174). In rejecting the state's claim that the district court could not assert jurisdiction over state officials under the All Writs Act, we noted that the district court "was faced with the necessity of acting immediately to relieve already-adjudicated unconstitutional conditions . . . and of avoiding the delay that would be entailed in the relitigation of those conditions." *Id.* Consequently, we held that exceptional circumstances justified the exercise of jurisdiction under the All Writs Act.

In the instant case, the record indicates that had the district court known from the outset that the Raceway and the Seminary would challenge the designation of their properties for condemnation as "null and void," the Consent Decree would have included a provision requiring that the condemnation proceedings be instituted in federal court, presumably under the "residual jurisdictional authority" of the All Writs Act. In retrospect, the assertion by the district court of jurisdiction in the first instance over the condemnation of petitioners' properties might have been a better course of action. We certainly would be less troubled by the use of the All Writs Act to initiate the condemnation proceedings in federal court had Judge Sand deemed petitioners to be necessary third parties to the implementation of the Consent Decree in the underlying civil rights litigation. Nevertheless, we

must decide the case before us, and as a practical matter we see no reason why it is any less "necessary or appropriate" at this stage of the proceedings to invoke the authority of the All Writs Act. *Cf. In re Baldwin-United Corp.*, 770 F.2d 328, 337 (2d Cir. 1985) (using All Writs Act to enjoin non-parties from *commencing* actions in state court where such proceedings would "threaten[] to frustrate proceedings in a federal action"). Moreover, were we to decide that removal was improper under the All Writs Act, the state court would be faced with a situation in which any order it issued that was inconsistent with the Consent Decree would be subject to the injunctive powers of the federal court under the exception provisions of the Anti-Injunction Act. *See* 28 U.S.C. § 2283 (fededal court may not grant injunction against state court "except as expressly authorized by . . . Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments"); *see also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d 383, 384 (4th Cir. 1974) (possibility of "conflicting orders from state and federal courts" sufficient to warrant injunctive relief against state court under 28 U.S.C. § 2283). Use of the All Writs Act in this case to effectuate removal thus seems to us to be a less drastic, and therefore preferable, result.

In sum, we agree with the district court that this is indeed an exceptional case. While we too have confidence in the "ability, objectivity, [and] integrity of the state court" to render an appropriate decision in an Article 78 proceeding, the fact remains, as the district court recognized, that "the issues raised [by the Article 78 proceedings] go to the very essence" of the Consent Decree. If this case simply involved ordinary condemnation proceedings collateral to the implementation of the housing remedy order, that would be one thing. *Cf. Pennsylvania Bureau of Correction*, 474 U.S. at 40 (All Writs Act does not authorize federal court to order

United States Marshals "to transport state prisoners from state prisons to the federal couthouse *in the ordinary course of litigation*") (emphasis added). But as the United States has recognized, "[t]he City's condemnation petitions, initiated pursuant to court order, must be seen in the context of the *Yonkers* [civil rights] litigation. The condemnor here is not the City acting in isolation[,] but the City acting at the behest of the court[,] the *Yonkers* plaintiffs and . . . 'the people who have been deprived of opportunities for housing free of racial discrimination.'" Department of Justice Brief at 37 (quoting Judge Sand, Transcript of Proceedings, June 8, 1988).

Despite the City's assurances through its counsel that it would vigorously defend against the Article 78 petitions, we have serious doubts whether a reluctant condemnor, which at every opportunity has resisted implementation of the Housing Remedy Order, could be counted on in state court to adequately protect the integrity of the Consent Decree. To believe otherwise would be to ignore the fact that Yonkers entered into the Consent Decree and instituted the condemnation proceedings only after being threatened by the district court with sanctions for contempt. "One must realistically deal with the fact," Judge Sand explained, "that the positions which the city would be compelled to take in [state court] would be significantly contrary to positions taken by [it] in [the district] court." The inconsistency of these positions convinces us, therefore, of the necessity to exercise removal jurisdiction to prevent frustration of the Housing Remedy Order.

Accordingly, we hold that removal was proper under the All Writs Act. We do so because removal was necessary to protect the integrity of the Consent Decree and because the issues raised by the Article 78 petitions cannot be separated from the relief provided by the Consent Decree. *Cf. Swann v. Charlotte-Mecklenburg Bd. of*

Educ., 501 F.2d at 384 (affirming issuance of injunction under Anti-Injunction Act because "issues being litigated in the state court proceeding could not be separated from the issues and relief involved in the federal court suit"). The implementation of that decree takes precedence over petitioners' desire to have the defenses to the condemnation of their properties litigated in state court. *Cf. North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971). Given the exceptional circumstances presented here, it is clear that the power of the All Writs Act extended over petitioners who were "in a position to frustrate the implementation" of the Consent Decree. *New York Telephone Co.*, 434 U.S. at 174. If the power exists to issue extraordinary orders under the Anti-Injunction Act and the All Writs Act to prevent the prosecution of state proceedings, surely in this case it also exists to effectuate removal notwithstanding the availability of an independent basis for the exercise of jurisdiction under the federal removal statutes. In any event, by removing the Aritcle 78 proceedings to federal court, petitioners are not being deprived of their statutory right to assert defenses to the taking of their properties; they are merely being prevented from litigating those defenses in state court. We conclude, therefore, that because of the significant risk of inconsistent decrees from two courts, it was "necessary or appropriate" for the district court to invoke the residual jurisdictional authority of the All Writs Act.

II. THE MERITS OF THE ARTICLE 78 PETITIONS

A. EDPL

The Raceway and the Seminary contend on the merits that the City failed to comply with the notice, hearing and review requirements of Article 2 of New York's Eminent Domain Procedure Law (EDPL). In its condemnation petitions, the City claimed to be exempt from compliance with the procedural requirements of the stat-

ute pursuant to the "emergency situation" provision of EDPL § 206.

Section 201 of the EDPL provides that, "prior to acquisition, the condemnor, in order to inform the public and to review the public use to be served by a proposed public project and the impact on the environment and residents of the locality where such project will be constructed, shall conduct a public hearing." The hearing must be held on at least ten days prior notice, EDPL § 202, and following the hearing, the condemnor is required, within ninety days, to make findings and a determination of the public purpose to be served by the proposed condemnation. EDPL § 204. The factors to be considered in making such determination and findings include:

> (1) the public use, benefit or purpose to be served by the proposed public project;
>
> (2) the approximate location for the proposed public project and the reasons for the selection of that location;
>
> (3) the general effect of the proposed project on the environment and residents of the locality;
>
> (4) such other factors as [the condemnor] considers relevant.

Id. § 204(B).

A condemnor is exempt from compliance with the provisions of Article 2 of the EDPL when, *inter alia*, "because of an emergency situation the public interest will be endangered by any delay caused by the public hearing requirement in this article." *Id.* § 206(D). The district court found that "[c]ontrary to the claims of St. Joseph's and the Raceway, the City of Yonkers, in a very real sense, *is* faced with an emergency" (emphasis in original). As the court further explained, "[t]his matter must end" because it is "tearing Yonkers apart and Yonkers is bleeding,"

We believe that the district court's factual finding of such an "emergency situation" is amply supported by the record. *See id.* § 207(C)(3), (4) ("scope of the review shall be limited to whether . . . determination and findings were made in accordance with procedures set forth in [Article 2], and [whether] a public use, benefit or purpose will be served by the proposed acquisition"); *see also Gerges v. Koch*, 62 N.Y.2d 84, 476 N.Y.S.2d 73 (1984) (emergency situation presented by prison overcrowding warranted temporary exemption under New York City's Environmental Quality Review (CEQR) procedures, which parallel provisions of SEQRA, from filing environmental impact statement in order to begin renovation and construction of facilities as remedy for deprivation of constitutional rights of prisoners); *Board of Visitors-Marcy Psychiatric Center v. Coughlin*, 60 N.Y. 2d 14, 466 N.Y.S.2d 668 (1983) (same, except pursuant to SEQRA); *City of Yonkers v. Hvizd*, 93 A.D.2d 887, 461 N.Y.S.2d 408 (2d Dep't 1983) (existence of emergency situation endangering public interest warrants application of EDPL 206(D) exemption); *Matter of Village of Malverne*, 70 A.D.2d 920, 418 N.Y.S.2d 93 (2d Dep't 1979) (same). More than two years after the issuance of the Housing Remedy Order and eight years since the commencement of the civil rights action, no housing remedy has been implemented. The public interest cannot wait any longer. We thus agree with the district court that the "1200 people on the waiting list for public housing in Yonkers have a right to a remedy," and in our judgment any further delay—aside from that which is necessary to address the first amendment claim of the Seminary as discussed in Part II. C. below—would be intolerable.

Appellants maintain that the only emergency in this case is the result of Yonkers own intransigence, and consequently that full compliance with the terms of the statute cannot be excused. We disagree. An assessment of blame regarding the predicament in which Yonkers

presently finds itself is quite frankly irrelevant to a determination of whether or not Yonkers is faced with an "emergency situation" under the statute. *Cf. Gerges*, 62 N.Y.2d at 95, 476 N.Y.S.2d at 78 (that municipal officials "might have foreseen and . . . made appropriate provision for . . . resolution" of emergency situation regarding constitutionally inadequate prison facilities "does not negate the existence of the present crisis"). Indeed, the very purpose of the exemption provisions under Article 2 of EDPL is to excuse compliance with the procedural requirements of the statute when the public interest so requires. *See City of Buffalo Urban Renewal Agency v. Moreton*, 100 A.D.2d 20, 473 N.Y.S.2d 278, 281 (4th Dep't 1984); *see also Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 503 N.Y.S.2d 298, 305 (1986) ("principal purpose of Article 2 . . . is to ensure that [the condemnor] does not acquire property without having made a reasoned determination that the condemnation will serve a valid public purpose").

Appellants concede that the construction of low income housing in Yonkers required by the Housing Remedy Order would serve a valid public purpose. In addition, as the district court stated, "[t]he process by which the public housing sites designated in the Consent Decree were determined, the notoriety of that process, the review already given to those sites and the continuing review . . . by HUD certainly satisfied the substance of the State law provisions upon which St. Joseph's and the Raceway predicate their claims." *See also Aswad v. City School Dist.*, 74 A.D.2d 972, 425 N.Y.S.2d 896, 898 (3d Dep't 1980) (holding that "substantial compliance" with exemption provisions of section 206 and four factors enumerated in section 204(B) was sufficient to confirm proposed condemnation). We agree that there was substantial compliance with the requirements of the EDPL in this case. During extensive proceedings before the district court, the City's independent planning experts, the

court-appointed Outside Housing Advisor, the Municipal Housing Authority and the City's Community Development Agency all participated in a thorough review of the location, distribution and suitability of the 7 designated sites. With regard to the "general effect" of the proposed condemnations "on the environment and residents of the locality," EDPL § 204(B)(3), HUD conducted a preliminary evaluation as part of its ongoing review of the sites and reported to the district court that the housing plan appeared to meet site, neighborhood and environmental standards for public housing. *See generally* 24 C.F.R. § 941.202 (1988).

Consequently, given the undisputed public purpose inherent in the implementation of the Housing Remedy Order and the nature and extent of the review process, we are convinced that there was a valid determination that the proposed condemnations would be in the public interest as required under Article 2 of the EDPL.

B. SEQRA

The New York State Environmental Quality Review Act (SEQRA), Environmental Conservation Law (ECL) § 8-0101 *et seq.*, requires the preparation of an environmental impact statement (EIS) by state and local agencies "on any action they propose or approve which may have a *significant effect* on the the environment." *Id.* § 8-0109(2) (emphasis added). Pursuant to regulations adopted thereunder, the Department of Environmental Conservation has determined the types of actions having such a "significant effect" ("Type I" actions) for which an EIS must be prepared. 6 NYCRR § 617.12. When an EIS is required, the full panoply of procedures prescribed under SEQRA comes into play. *See* ECL § 8-0109. If, on the other hand, it is determined that the proposed action is one not likely to have a significant effect on the environment ("Type II" action), then such action "do[es] not require [an] environmental impact statement[] or

any other determination or procedure" under SEQRA. 6 NYCRR § 617.13; *see Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 503 N.Y.S.2d 298, 304 (1986) ("the heart of SEQRA is the [EIS] process"); *see also* CPLR § 7803(3) (scope of review is limited to whether determination was "arbitrary[,] capricious or an abuse of discretion").

Although appellants concede that the proposed condemnations of the two sites are not Type I actions requiring the preparation of an EIS, *see* 6 NYCRR § 617.12(b), they argue nonetheless that an environmental assessment of the proposed condemnations should have been made to determine if there would be a significant impact on the environment. *See* ECL § 8-0109(4); 6 NYCRR § 617.6 (a)(1)(i). However, as indicated in Part II. A. above, HUD is in the process of conducting an environmental review of the proposed housing sites pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* *See* 24 C.F.R. § 941.208(b) (1988); *see also* EDPL § 204(B)(3) (requiring consideration by condemnor of "the general effect of the proposed project on the environment"). Thus, the environmental assessment that appellants seek is in fact taking place.

In any event, we agree with the district court that the proposed condemnations of the Raceway and the Seminary sites are exempt from compliance with SEQRA. The implementing regulations to SEQRA expressly provide an exemption for actions "required to be undertaken pursuant to a judgment or order" and for "actions . . . of any court." 6 NYCRR § 617.2(q)(1), (5). Accordingly, in view of the fact that the City was compelled by a federal court order to institute condemnation proceedings against the subject properties and that there was, as the district court found, a "meticulous inquiry" regarding environmental factors, we conclude that the requirements of SEQRA were satisfied in all respects.

C. The First Amendment.

We come finally to the Seminary's challenge to the condemnation of its property on first amendment grounds.[3] In its Article 78 petition, the Seminary alleged that "[b]y the inclusion of the subject property in the [Consent Decree] and by the commencement of the condemnation proceeding, [the City] has attempted to regulate the use of church owned property without any compelling public interest and has sought the acquisition of the subject property in violation of . . . the First and Fourteenth Amendments to the United States Constitution." The Seminary's position is that, because the district court recognized on a number of occasions the availability of suitable alternate sites to the Seminary parcel and repeatedly stated its willingness to modify the Consent Decree should the City designate such an alternate site, no compelling need existed to justify the proposed condemnation of the Seminary's property.

The first amendment provides that "Congress shall make no law . . . prohibiting the free exercise [or religion]." U.S. Const. amend. I; *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (first amendment free exercise clause is applicable to states through fourteenth amendment). In order to show that a particular governmental action implicates the free exercise clause, the aggrieved party must show that the challenged action—in this case, the condemnation of church-owned property

---

[3] The Seminary also challenges the proposed taking of its property under Article I, § 3, of the New York State Constitution. The Seminary did not make any argument in the district court or in its brief on appeal, however, based specifically on New York law. We thus are afforded no grounds to consider whether New York's "free exercise and enjoyment of religious . . . worship" clause provides any broader protection than the first amendment regarding the City's proposed acquisition of the Seminary site, *cf. Brown v. McGinnis*, 10 N.Y.2d 531, 225 N.Y.S.2d 497 (1962), and proceed therefore to consider just the Seminary's federal constitutional claim.

—would coerce a violation of religious beliefs or would penalize the practice of religion by denying the aggrieved party "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 108 S. Ct. 1319, 1325 (1988). *See also School Dist of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) (coercion) ; *Sherbert v. Verner*, 374 U.S. 398, 402-06 (1963) (penalty). The state may, however, justify any such limitation on religious liberty by showing that its action is essential to accomplish an overriding or compelling governmental interest. *See, e.g., Hobbie v. Unemployment Appeals Comm'n of Florida*, 107 S. Ct. 1046, 1049 (1987) ; *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983) ; *United States v. Lee*, 455 U.S. 252, 257-58 (1982).

The Seminary's free exercise challenge to the proposed taking of its property raises an issue which has only very rarely been presented. While the condemnation of church property for public use is not unheard of, *see, e.g., United States v. 564.54 Acres of Land, More or Less*, 506 F.2d 796 (3d Cir. 1974) ; *Foster v. Herley*, 491 F.2d 174 (6th Cir. 1974) ; *Kozemchak v. Ukrainian Orthodox Church of Am.*, 443 F.2d 401 (2d Cir. 1971), we are aware of no federal court case in which a religious organization has challenged the taking of real property on free exercise grounds. The parties in the instant case, however, have discussed at some length a decision of the Colorado Supreme Court, *Pillar of Fire v. Denver Urban Renewal Auth.*, 181 Colo. 411, 509 P.2d 1250 (1973), in which this precise issue was considered, apparently for the first time.

In *Pillar of Fire*, an evangelical sect sought to enjoin a municipal urban renewal agency from condemning a church building said to have unique religious significance. The building was alleged to be *sui generis* and the birthplace of the Pillar of Fire denomination. However, the record contained no findings indicating that the trial

court weighed the competing interests of church and state regarding the proposed condemnation. After expressing concern about "direct confrontations of the sort in this case [which] have been avoided because legislatures and administrative bodies have generally accorded *great respect* to religious organizations," 509 P.2d at 1254 (emphasis added), the Colorado Supreme Court remanded the case to the trial court for a full hearing. The court noted that the "loss of the Pillar of Fire [Church] would allegedly go far beyond the incidental burden of having to move to a new location" and, as a result of the competing interests involved, required that on remand a determination be made whether the state had a "substantial interest" in the taking of the alleged birthplace of the Pillar of Fire Church "without a reasonable alternate means of accomplishment" of its plans for urban renewal. *Id.* at 1253-54; *see Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); *cf. Father Flanagan's Boys' Home v. Millard School Dist.*, 196 Neb. 299, 242 N.W.2d 637 (condemnation of 40-acre tract of farmland owned by church would not substantially interfere with church's school program since more than 900 acres would remain after taking), *cert. denied*, 429 U.S. 887 (1976). Although the Colorado court conceded that church property could be taken by eminent domain for "paramount public use," 509 P.2d at 1254 (citation omitted), the court nonetheless concluded that the church was entitled to a hearing on the merits of its first amendment claim.[4]

---

[4] On remand, the trial court found that, despite Pillar of Fire's allegations to the contrary, the church property was neither the birthplace nor the mother church of the Pillar of Fire denomination. When the case returned to the Colorado Supreme Court on appeal, the court upheld the trial court's subsequent finding that the church property was not *sui generis* and also cited evidence from the record supporting the state's "weighty and substantial" need for the property. *Denver Urban Renewal Auth. v. Pillard of Fire*, 191 Colo. 238, 552 P.2d 23, 25 (1976). In the court's view, even had

In support of its claim of a free exercise infringement, the Seminary, during the June 8, 1988 proceedings before the district court, relied principally on an affidavit of Monsignor Edwin O'Brien, the Rector at St. Joseph's, who stated that the Seminary grounds, including the two acres designated for public housing, form an "apron" of quietude surrounding St. Joseph's and contribute to the "atmosphere of quiet reflection" essential to the "academic, spiritual, psychological and pastoral" preparation of young men for the priesthood. Monsignor O'Brien also averred that the two-acre site together with the remaining forty-two acres of church property have been used for religious purposes by the Archiocese at least since the opening of the Seminary in 1896 and that "the construction of multi-family housing . . . [would] substantially affect our work at St. Joseph's" the only facility in the Archdiocese for the training of new priests.

The district court considered without resolving the question of whether the taking of the Seminary's property would constitute an interference with the free exercise rights of the Archdiocese. Counsel for the Seminary argued before the district court that, because the use of the two acres would substantially affect the work at the Seminary, the condemnation of the site would violate the first amendment. He added, however, that that "doesn't mean . . . the church could not agree voluntarily . . . to use of the property . . ., but [the property] is not going to be . . . willingly subjected to condemnation under this plan." Clearly perplexed by the "varying positions" of the Archdiocese regarding the inclusion of its property as part of the Consent Decree, the district court described

---

Pillar of Fire proven that the church building was *sui generis*, the record now indicated a substantial state interest in the condemnation of the building without an alternate means of accomplishing the urban renewal project. Accordingly, the Colorado Supreme Court affirmed the trial court's decision allowing the condemnation of the Pillar of Fire Church.

the Seminary's claim of religious interference as equivocal: "if there [is] agreement by the Archdiocese with the overall plan, it [would] allow the use of this property, and that would not interfere with free exercise rights; but since the Archdiocese has reservations . . . with respect to the overall plan, it is resisting the taking on free exercise grounds." Nevertheless, the district court assumed the validity of the Archdiocese's claim of religious use of the property and proceeded to balance the competing interests of church and state, finding that the purported constitutional necessity to include the Seminary property into the Consent Decree outweighed the Seminary's first amendment rights.

The Seminary argues on appeal that "while it is very true that a remedy for the proven segregative policies of the City is necessary, it is just as true that the Seminary property is *not* necessary to that remedy." Reply Brief at 22 (emphasis in original). The Archdiocese further contends that the City's refusal to modify the decree because it believed there were no "politically acceptable" alternatives to the Seminary site is hardly a sufficient reason to justify infringement of a first amendment privilege. In the Seminary's view, therefore, the district court's conclusion concerning the compelling need for the Seminary's property was simply not supported by the record.

Appellees respond first by claiming that under *Lyng* the Seminary was unable to show that the condemnation of its property would have a coercive or penal effect on the practice of religion. *See* 108 S. Ct. at 1325. In *Lyng*, members of three Indian tribes in northwest California challenged a United States Forest Service plan to build a paved 75-mile road connecting two towns, Gasquet and Orleans, on a 6-mile stretch of land located in the Six Rivers National Forest that, while *owned by the federal government*, traditionally had been used by the Indians for religious purposes. The Forest Service commissioned

a study of the American Indian cultural and religious sites in the Chimney Rock area of Six Rivers which found that the region was integral to Indian religious ritual, and that "privacy, silence, and an undisturbed natural setting" were necessary to the practice of their religion. *Id.* at 1322. The report accordingly recommended that the roadway not be completed. The Forest Service decided, however, not to adopt this recommendation and proceeded to select a route through the Chimney Rock area as far removed as possible from the archeological and other sites used by the Indians for spiritual activities. Alternate routes specifically were considered and rejected "because they would have required the acquisition of *private land*, had serious soil stability problems, and would in any event have traversed areas having ritualistic value to American Indians." *Id.* (emphasis added).

The Supreme Court in *Lyng* held that, notwithstanding the undisputed severe adverse effects completion of the proposed roadway would have on the practice of the Indians' religion, "[w]hatever rights the Indians may have to the use of the [Chimney Rock] area . . ., those rights do not divest the Government of its right to use what is, after all, *its* land." *Id.* at 1327 (emphasis in original) (citation omitted). While recognizing that "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment," the Court noted that "[t]his does not and cannot imply that *incidental* effects of government programs, which may make it more difficult to practice certain religions but which have no *tendency* to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Id.* at 1326 (emphasis added).

Appellees seize upon the first amendment principles considered in *Lyng* in support of their contention that

the free exercise clause does not prohibit governmental action that would substantially interfere with the practice of religion so long as the government's conduct is not actually coercive or penal in nature. We disagree. The *Lyng* Court declined to determine the "exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs." *Id.* The Supreme Court merely held that "whatever" the effect completion of the roadway might have on traditional Indian religious practices, the government could not be denied use of its own land. *Id.* at 1327 (citing with approval *Bowen v. Roy*, 476 U.S. 693, 724-27 (1986) (O'Connor, *J.*, concurring in part, dissenting in part) (distinguishing between government's use of Social Security number in its possession to aid administration of welfare programs and the government's *requiring* individual to provide such information)). Besides, as Judge Lumbard has recognized, the government's use of its property involves significantly different considerations than the taking by the government of privately-owned religious property. *See Wilson v. Block*, 708 F.2d 735, 742 n.3 (D.C. Cir.) (Lumbard, *J.*, sitting by designation) (distinguishing *Pillar of Fire*), *cert. denied*, 469 U.S. 956 (1983). Incidental burdens on the practice of religion will not suffice to require the state to come forward with a compelling reason justifying its actions. When, as is claimed in this case, however, a proposed governmental action would substantially effect the practice of religion, there exists at least a material issue of fact concerning whether the state has interfered with the free exercise of religion. *Cf. Lyng*, 108 S. Ct. at 1326; *see Wisconsin v. Yoder*, 406 U.S. at 218; *see also Johnson v. Katz*, 68 N.Y.2d 649, 505 N.Y.S.2d 64, 65 (1986) (lack of "material issue of fact" warrants dismissal of Article 78 petition without a hearing); CPLR § 7804(h) (requiring hearing on any "triable issue of fact").

The Seminary's initial willingness to sell the two-acre parcel in January 1988 does not alter our determination that the proposed taking of the Seminary's property raises a significant question under the first amendment. As the district court itself stated, "if [the] taking [of] these two acres [constitutes] an interference with [the] free exercise of a religion[,] that is the case regardless of what the attitude of the church is to the overall [housing] plan." There is in our judgment an enormous difference between the Archdiocese agreeing to sell its property and the government proceeding to condemn it. We certainly do not take lightly the Seminary's claim of interference with a first amendment right. In any event, the district court assumed for purposes of its decision the validity of the Seminary's claim of religious interference. To have held otherwise, the district court would have had to hold a plenary hearing on the issue. Indeed, since the record before us does not reflect a considered judgment on the religious interference question, we do not preclude the district court on remand from addressing this issue. Nevertheless, we too accept as true for purposes of this appeal the Archdiocese's allegations that the taking of the Seminary site would "substantially affect [the] work at St. Joseph's and that the site is "essential" to the Seminary's mission. *Cf. Pillar of Fire*, 509 P.2d at 1253-54.

Turning to the question of whether the condemnation of the Seminary's property is essential to achieve a compelling state interest, it is well settled that a limitation by the government on the free exercise of religion is permitted only when the state can demonstrate that a compelling interest justifies the restriction and that no alternate means of accomplishing the state's compelling interest are available. *See Brandon v. Board of Educ.*, 635 F.2d 971, 976 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); *see also Sherbert v. Verner*, 374 U.S. at 406; *Pillar of Fire*, 509 F.2d at 1253. Consistent with the district court's disposition below, appellees assert

that the inclusion of the Seminary property in the Consent Decree is essential to the implementation of the Housing Remedy Order.

We do not agree that this as necessarily so. Although the district court considered the universe of reasonable alternate sites to be limited to those "capable of being utilized in a federal decree [with] a reasonable timetable for implementation," the court also clearly recognized the availability of such sites since it was willing to permit the City to designate a substitute for the Seminary property. Thus, the City's steadfast refusal to propose a modification of the Consent Decree to delete the Seminary site does not provide a sufficient basis to justify interference with petitioner's first amendment right. While the City now takes the position that the "framework for remedying the constitutional violation found by the district court cannot be modified simply by substituting sites [because t]here are no politically acceptable alternatives," City of Yonkers Brief at 35, the fact remains that political expediency is far from a compelling reason to force the Seminary to give up its property in derogation of a constitutional right.

Consequently, assuming as we do for purposes of this appeal that the taking otherwise impermissibly burdens the Seminary's free exercise rights, the Seminary is entitled to be heard on the issue whether the taking is necessary to vindicate a compelling state interest. At such a plenary hearing with expert testimony from both sides and in which the competing interests of church and state are fully addressed and the availability of reasonable alternate sites seriously considered, the district court will be able to determine whether the public interest in remedying discrimination can be reasonably accomplished without the taking of the Seminary's property. The point is that on the basis of the existing record before us, we are not in a position to make an intelligent judgment in this matter one way or the other. The pro-

tections afforded by the first amendment require at the very least that the Seminary have a full and fair opportunity to have its rights considered in an attempt—consistent with the "great respect" courts accord religious groups—to avoid a direct confrontation between church and state. *See Pillar of Fire*, 509 P.2d at 1254. If accommodation between the competing interests of church and state is possible, then it ought to be pursued no matter how compelling the state interests might be. *See Lyng*, 108 S. Ct. at 1327-28 ("[n]othing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen[; t]he Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices") (citation omitted); *Wisconsin v. Yoder*, 406 U.S. at 215; *Sherbert v. Verner*, 374 U.S. at 406-07.

* * *

One final word is in order. The patience exhibited by the district court under enormously trying circumstances is commendable. Judge Sand has always kept sight of the decisive objective in this case: "[t]hat is, to build the [200 units of] housing as quickly as possible in a manner . . . which will enable future generations in Yonkers to look back and say this was the best possible housing in the best possible locations [that could be built] under the circumstances which obtained in 1988." We trust that the district court will find some way to facilitate reconciliation among everyone concerned in this case so that implementation of the first leg of the Housing Remedy Order can begin as quickly, and hopefully as smoothly, as possible.

CONCLUSION

We affirm the district court's order denying petitioners' motions to remand for lack of federal removal jurisdiction under the authority of the All Writs Act. We also affirm the court's order dismissing the Article 78 petitions in every respect except with regard to the Seminary's first amendment challenge to the taking of its property which is remanded to the district court for further consideration consistent with the views expressed in this opinion. The mandate shall issue in 7 days, and it is so ordered.

Affirmed in part, vacated and remanded in part.

MAHONEY, *Circuit Judge*, dissenting:

I respectfully dissent. In my view, the Article 78 proceedings were improperly removed and should be remanded to state court. Accordingly, I would not reach the merits.

The facts respecting the removal are straightforward. The City commenced condemnation proceedings against the Raceway and the Seminary, as required by the Consent Decree, on April 21, 1988. The Raceway and the Seminary filed answers and, on May 18, 1988, filed Article 78 petitions as well, presumably for protective reasons.[1]

On the morning of May 27, 1988, before any significant action had been taken in state court with respect either to the condemnation or Article 78 proceedings, the district court signed an order to show cause bringing on, later that morning a motion by the United States in the federal litigation to compel the City to petition for removal of the Article 78 proceedings to the federal district court. The motion was granted, and the City so ordered, later that day. Accordingly, the City filed a petition for removal on May 31, 1988, whereupon the Raceway and Seminary moved to remand the Article 78 proceedings to state court.

On June 8, 1988, the district court heard arguments on both the motions to remand and the merits of the Article 78 proceedings. That day, the district court denied the motions to remand, rejected all of the claims

---

[1] *Compare Piotrowsky v. Town of Glenville*, 101 A.D.2d 654, 475 N.Y.S.2d 511 (3d Dep't 1984) (defenses to a taking of property by condemnation properly raised by initiation of separate Article 78 proceeding), *with Town of Cocksackie v. Dernier*, 105 A.D.2d 966, 482 N.Y.S.2d 106 (3d Dep't 1984) (such defenses may be raised by answer in condemnation proceeding). The Raceway and the Seminary posed the same defenses both by answer in the condemnation proceedings and in their separate Article 78 proceedings; the latter also sought to enjoin the condemnation proceedings.

raised by the Raceway and the Seminary concerning the merits of the Article 78 proceedings, and dismissed the Article 78 proceedings. The district court then ordered:

> that St. Joseph's and the Raceway shall forthwith each serve on the State court in the pending eminent domain proceedings against their properties a copy of this Order and present to such Court a proposed order stating that, insofar as all substantive grounds for objection to the proceedings in question have been fully litigated and resolved in this Court, the City of Yonkers' petitions in those actions should be granted and the eminent domain proceedings shall go forward in accordance with State law in order to determine the sole remaining issue of valuation of St. Joseph's and the Raceway's properties.[2]

Against this background, the majority concludes that removal of the Article 78 proceedings pursuant to the general removal statute, 28 U.S.C. § 1441 (1982 and Supp. IV 1986), or the civil rights removal statute, 28 U.S.C. § 1443 (1982), presents a "difficult question," but that removal is in any event authorized by the All Writs Act, 28 U.S.C. § 1651(a) (1982). I disagree with both conclusions.

As to the general and civil rights removal statutes, both allow removal only by a "defendant" (or, in the case of section 1441, "defendants," presumably a distinction without a difference), and the Supreme Court has twice held that whatever labels state law may apply, a condemnee is a defendant for purposes of federal removal statutes. *See Chicago, Rock Island & Pac. R.R. v. Stude*, 346 U.S. 574, 580 (1954); *Mason City & Fort Dodge R.R. v. Boynton*, 204 U.S. 570, 579-80 (1907). In both those cases, as here, a complaining landowner was re-

---

[2] Because only the Article 78 proceedings had been removed, the condemnation proceedings remained pending before the state court, thus providing a basis for a state court determination as to value.

quired by state law to initiate an action to raise objections to condemnation, in which action the landowner was denominated the "plaintiff" by state law. Both cases held the landowner/condemnee was the defendant for federal removal purposes, regardless of state law, and therefore, the only party that could remove the case to federal court.

In all candor, given the clear language of the pertinent statutes and the equally clear holdings of two Supreme Court decisions, I do not regard this question as difficult, or even close. Removal is manifestly not warranted by 28 U.S.C. § 1441 (1982 and Supp. IV 1986) or 28 U.S.C. § 1443 (1982). This brings us to the All Writs Act, 28 U.S.C. § 1651(a) (1982). *Cf.* 28 U.S.C. § 2283 (1982) (federal court stay of state court proceedings).

Echoing the rationale expressed by the district court, the majority concludes that "because of the significant risk of inconsistent decrees from two courts, it was 'necessary or appropriate' [within the meaning of 28 U.S.C. § 1651(a) (1982)] for the district court to invoke the residual jurisdictional authority of the All Writs Act." The majority notes also that, in light of the history of the underlying federal litigation, the City is likely to be a reluctant and ineffective party to the state condemnation proceedings, whatever assurances it may give to the federal district court in that regard.

In reaching this conclusion, the majority cites and discusses the leading Supreme Court case on this issue, *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34 (1985), but never sets forth the basic rule articulated in that case for a situation where, as in the case of removal, other federal statutes address the issue or situation before the court. That rule is:

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by

> statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although the Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.

Id. at ——, 106 S. Ct. at 361.

Pennsylvania Bureau of Correction held that the pertinent habeas corpus statute, which stated that the writ should be directed "to the person in whose custody the party is detained," did not authorize direction of the writ to a noncustodian; and that the All Writs Act should not be invoked for that purpose in view of the statute specifically addressed to the situation and making a different provision. *Id.* at ——, 106 S. Ct. at 360-61. The court, added, however:

> There may be exceptional circumstances in which a district court can show clearly the inadequacy of traditional habeas corpus writs, such as where there are serious security risks. In such circumstances, a district court may find it "necessary or appropriate" for Marshals to transport state prisoners. We therefore leave open the question of the availability of the All Writs Act to authorize such an order where exceptional circumstances require it.

Id. at ——, 106 S. Ct. at 361.

When the issue which this court must decide is properly framed in terms of the controlling authority of *Pennsylvania Bureau of Correction*, it is apparent that the removal undertaken below and approved by the majority here was not warranted by the All Writs Act. Whatever the difficulties in the underlying federal civil rights litigation, to which of course the Raceway and the Seminary are not parties, I see no warrant for a preemp-

tive strike upon a state court which had not even begun to consider the eminent domain proceedings pending before it.

Both the district court below and the majority here acknowledge the "ability, objectivity, [and] integrity of the state court." The officers of that state court are, it might be added, sworn to support the Constitution of the United States. U.S. Const. Art. VI, cl. 3. Accordingly, the state court was entitled to a presumption at the outset of the condemnation proceeding that it would proceed with sensitivity to and awareness of the legal and social context in which the condemnations are occurring.[3] In sum, there was no basis to disregard the "principles of equity, comity and federalism," *see Mitchum v. Foster*, 407 U.S. 225, 243 (1982); *see also Kerr-McGee Chemical Corp. v. Hartigan*, 816 F.2d 1177, 1181-82 (7th Cir. 1987), which should govern our consideration of this issue.

The authorities cited by the majority in support of removal are easily distinguishable. *United States Alakli Export Ass'n, Inc. v. United States*, 325 U.S. 196 (1945), construed the All Writs Act to authorize an appeal of a district court determination that it had jurisdiction over a dispute whose resolution, in the Supreme Court's view, Congress had entrusted exclusively to the Federal Trade Commission. There is no question here that the state court is an appropriate forum to deal with eminent domain proceedings under state law.

---

[3] It was similarly premature to allow removal on the assumption that the City would be a reluctant condemnor when, whatever weight is accorded to that hypothesis, the United States and/or the N.A.A.C.P. could seek to intervene in the state court proceedings, and it appears likely that such an application would be granted. *See* N.Y. Civ. Prac. L. & R. 1013 (1976); *Bay State Heating & Air Conditioning Co. v. Am. Ins. Co.*, 78 A.D.2d 147, 434 N.Y.S.2d 66 (4th Dep't. 1980).

The All Writs Act was invoked in *Benjamin v. Malcolm*, 803 F.2d 46 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1358 (1987), to allow the addition of state defendants in a lawsuit challenging overcrowding in New York City jails where the state was dilatory in accepting transfer of prisoners, thus precluding correction of constitutional violations, and relief could not practically be achieved without the decree joinder. *United States v. New York Telephone Co.*, 434 U.S. 159 (1977), is similar. Again, there is no question here of adding parties in order to achieve an effective remedy. *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985), found authority in the All Writs Act to enjoin non-parties from commencing state court actions which would undermine the impending settlement of a multidistrict federal class action, a situation totally afield from the present litigation.

Swann v. Charlotte-Mecklenburg Bd. of Educ., 501 F.2d 383 (4th Cir. 1974), found warrant in an express exception to the Anti-injunction Act, 22 U.S.C. § 2283 (1982),[4] to prohibit defendants in a federal school desegregation suit from pursuing a state court action invoking a state statute expressly designed to frustrate school desegregation, noting the possibility of "conflicting orders from state and federal courts." *Id.* at 384.

Perhaps my colleagues' invocation of the *Swann* decision best highlights my disagreement with the majority's ruling. The defendants who were enjoined in *Swann* were principals in protracted federal school desegregation litigation who initiated state court proceedings likely to result in orders pursuant to state law which would contradict and undermine the desegregation orders of the

---

[4] 22 U.S.C. § 2283 (1982) provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

federal court. Here, on the contrary, the Raceway and Seminary are not parties to the underlying federal civil rights litigation, and invoke only the normal rights under New York and federal law of owners of property designated for condemnation by a public authority. It would, of course, be ludicrous to enjoin the Raceway and the Seminary from participating further in the state condemnation proceedings. Since only such an injunction would put this case on all fours with *Swann*, it is clear that *Swann* provides no authority for the course followed here.

There was no analogue in *Swann*, moreover, to the action of the district court here in removing the Article 78 proceedings from state court, purporting to determine all the substantive issues in that proceeding the same day the removal occurred, and then directing the parties to present a proposed order to the state court, before which the related condemnation proceedings remained pending, reciting that all the substantive issues in the condemnation proceedings had been decided and the state court should accordingly proceed "to determine the sole remaining issue of valuation."

I am afraid that the fevered and highly publicized situation in Yonkers has led both the district court and my colleagues to a novel and unwarranted application of the All Writs Act which is abusive both of the condemnees and, more importantly, of the most elementary principles of the comity that should exist between federal and state courts. I would not, of course, following *Pennsylvania Bureau of Correction*, rule out the use of the extraordinary residual authority provided by that statute if future circumstances warrant its invocation. In my view, however, its application in the circumstances presented by this record was manifestly premature and improper. I therefore respectfully dissent.

APPENDIX B

Opinion of the United States District Court,
Southern District of New York,
Issued from the Bench (Pages 65-67)

* * * *

THE COURT: The following constitutes the opinion and order of the court on the motions to remand brought on behalf of the Yonkers Racing Corporation and St. Joseph's seminary and college. The motions are denied.

The court adheres to the views it previously expressed that a fair evaluation of the nature of these proceedings, that is the Article 78 proceedings, renders them an integral part of the efforts by a federal court to grant a remedy to the civil rights violations found to exist.

Removal is proper as to both petitioners under 28 USC 1443. It is available as well, certainly with respect to the seminary under 1441 and under the All Writs Act.

It would be difficult, even hypothetically, to construct a situation in which there is a closer relationship between the Article 78 proceedings and the implementation of a federal civil rights remedial order than is present here.

There is simply no substance to the claim being made that removal in any fashion deprives a property owner of its day in court.

There is no argument on the merits which could be made in the state court which is not available here. The difference is that in the context of this protracted litigation the record has already been made with respect to numerous issues.

For example, availability of alternate sites. Were these matters to be relitigated in a state court, the burden upon that tribunal would be horrendous.

The prospect of inconsistent decrees in contempt proceedings discussed by Judge Haight in the Quirk case is fully applicable here. The motions are denied, and I will endorse the motion papers accordingly.

The Article 78 is all that has been removed. The court will proceed to hear the Article 78 on its merits. The condemnation proceeding initiated in the Supreme Court pursuant to the consent decree continues in that court.

The only issues which are to be adjudicated in the state court are issues with respect to value. Very well.

* * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

88 Civ. 3764
(LBS)

IN THE MATTER OF THE APPLICATION OF
YONKERS RACING CORPORATION,
Petitioner,
against
THE CITY OF YONKERS,
Respondent.

For a judgment pursuant to Article 78 of the Civil Practice Law and Rules to review a determination by respondent to condemn real property owned by petitioner.

NOTICE OF MOTION TO REMAND

JUNE 8, 1988 WRITTEN ORDER

PLEASE TAKE NOTICE that upon the affidavit of Frederick J. Martin, sworn to June 6, 1988, the undersigned will move this court, at the United States Courthouse, Foley Square, New York, New York, on the 8th day of June, 1988, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order remanding the above-entitled action to the Supreme Court of the State of New York, County of Westchester, pursuant to the provisions of Section 1447 of Title 28 of the United States Code, on the ground that the case was removed to this court improvidently and without jurisdiction by a party lacking the capacity of a defendant, and that this Court lacks jurisdiction over the subject matter of this proceeding together with such

further and different relief as to the Court may seem just and proper.

Dated: White Plains, New York
June 6, 1988

BLEAKLEY & SCHMIDT

By: /s/ [Illegible]
A Member of the Firm

Attorneys for Petitioner
Office and P.O. Address
123 Main Street
White Plains, New York, 10601
Tele.: (914) 949-2700

TO: Michael W. Sculnick, Esq.
Vedder, Price, Kaufman,
Kammholz and Day
1 Dag Hammarskjold Plaza
New York, New York 10017

Brian F. Heffernan, Esq.
Office and P.O. Address
Civil Rights Division
U.S. Department of Justice
P.O. Box 65998
Washington, D.C. 20035-5998
Tele.: (202) 633-4755

Michael H. Sussman, Esq.
Office and P.O. Address
30 South Broadway
Suite 418
Yonkers, New York 10701

MEMO ENDORSED

"Motion Denied. See Transcript of Proceedings this date. So Ordered."

6/8/88

/s/ Leonard B. Sand
USDJ

Bench Opinion of the United States District Court
Southern District of New York

(Pages 134-138)

* * * *

THE COURT: The following constitutes the opinion of the court on Article 78 applications of St. Joseph's Seminary and Yonkers Raceway: The court will ask that there be prepared an order consistent with this opinion.

The temptation, of course, exists to write a lengthy and perhaps scholarly opinion on some of the issues raised by these Article 78 proceedings. The court will, however, resist that temptation because it believes that the issues are clearly focused and readily resolvable.

Also, contrary to the claims of petitioners in a very real sense, the City of Yonkers is faced with an emergency. The question of the designation of sites for the 200 units of public housing simply must come to closure. It must, however, be resolved without prejudice to the rights of the property owners before the court.

We seek expedition, but we do not seek expedition at the expense of any rights of the property owners.

Essentially three claims have been advanced. Both the Raceway and St. Joseph's Seminary contend that they have been deprived of rights which exist under state law with respect to notice, hearing and review.

The court agrees with the City of Yonkers, the Department of Justice and the NAACP in their contention that there exists either exemption from those notice hearing in review provisions under state law, or there has been such substantial compliance with the purpose of such notice and review provisions that state policy must give way when it operates to hinder the vindication of federal constitutional guarantees. North Carolina State Board of Education v. Swann, 402 US 43, 45.

The process by which the sites were determined, the notoriety given in the City of Yonkers to that process, the review given to those sites, the continuing review of those sites by HUD certainly satisfied the substance of the state law provisions upon which petitioners predicate their claims.

We agree with the argument made by the City of Yonkers that what is contemplated is that there be a review of the environmental and other issues raised, but not duplicative review. With respect to environmental issues, the purpose of the state law is to insure that there is a meticulous inquiry into all the factors that will impact on a community before taking is allowed. That has certainly occurred here. We believe that SEQRA regulations operate in a fashion which clearly exempt this proceeding.

The third issue raised is a First Amendment claim advanced by the St. Joseph Seminary. Much of the court's response to that contention has in substance been covered by the colloquy which has taken place during the past several hours. The process by which the seminary site was included in the seven sites in the consent order has been fully spelled out in this record.

The response of the church to the suggestion that the seminary site be included was at first a positive and affirmative response on which there was substantial reliance placed by all of the parties to this litigation. It enabled the consummation of the consent decree, the lifting of the freeze, the removal of the threat of the bankrupting fines, and the significant step forward toward the eventual vindication of the constitutional violations found by the court in its liability opinion overwhelmingly affirmed by the court of appeals.

The first significant suggestion after three months of dialogue or attempted dialogue that the taking of the seminary property was an interference with the free ex-

ercise rights of the Arch Diocese is set forth in an affidavit dated June 6th and furnished to the court and the parties at 5:00 p.m. on yesterday.

In that affidavit Monseigneur O'Brian speaks of the interference with the pastoral contemplative setting of the seminary which would result if the two acres were taken for purposes of the housing, but, as oral argument today disclosed, even that it equivocated because the court is told that if the overall plan was accepted or supported by the Arch Diocese, that it might then be willing to make the land available consistent with a view it first expressed on January 25th.

So that in essence the claim that is made is that if there were agreement with the overall plan, we could agree to this land being utilized for housing, and that would not be in interference with the free exercise rights, but since we have reservations with respect to the overall plan, unarticulated reservations, we resist the taking on free exercise grounds.

The issue is not whether the two acres at the extremity of the over 40-acre site near the intersection of the two roads can be said to serve some religious purpose. We agree with counsel for the intervenors that that is the beginning of the inquiry with respect to First Amendment issues.

Even if we assume arguendo despite the belatedness of the claim, that that is the case, the inquiry then becomes a balancing inquiry. There is a need here to vindicate the federal constitutional rights of those citizens of Yonkers who have for years been denied housing opportunities in the fashion set forth at painful length in the court's liability opinion.

The fact that the inclusion of the seminary property in the consent decree is an integral part of that decree, and, therefore, an essential component in the efforts to

vindicate those rights have been amply demonstrated during the course of today's argument.

The court finds that no valid claim of interference with free exercise rights under the First Amendment has been advanced.

With respect to the Raceway, the statement was made in oral argument that the parking lot is essential to the operation of the Raceway. That is contained only in the statment made in oral argument. There is no documentation of that claim, and the court rejects it. Accordingly, the petition for Article 78 relief is denied.

I would ask that the plaintiff and the plaintiff intervenors prepare an order which embodies these findings, and which will also serve the purpose we discussed earlier today of making clear to a Supreme Court justice that the petition for condemnation should be accepted, since the only substantive grounds for objection to its acceptance have been fully litigated and resolved in this court, and that what is to go forward in state court are matters relating to value and no other matters.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

88 CIV 3765 (LBS)

ST. JOSEPH'S SEMINARY AND COLLEGE,
Plaintiff,

v.

CITY OF YONKERS, *et al.*,
Defendants.

---

88 CIV 3764 (LBS)

YONKERS RACING CORPORATION,
Plaintiff,

v.

CITY OF YONKERS, *et al.*,
Defendants.

JUNE 13, 1988 WRITTEN ORDER

OPINION AND ORDER

These actions were originally separately filed by St. Joseph's Seminary ("St. Joseph's" or "the Archdiocese") and Yonkers Racing Corporation ("the Raceway") in the Supreme Court of the State of New York, County of Westchester, pursuant to Article 78 of the New York Civil Procedure Law and Rules (CPLR), seeking to en-

join the City of Yonkers from proceeding further with separate eminent domain proceedings against their respective property. Such eminent domain proceedings were initiated by Yonkers pursuant to the First Remedial Consent Decree in Equity ("Consent Decree") entered on January 28, 1988 by this Court in the action entitled *United States, et al.* v. *Yonkers Board of Education, et al.* (Civil Action No. 80-6761 (LBS) ("*Yonkers*").

By May 27, 1988 order of this Court in the *Yonkers* case, the City was required to petition for removal of these actions from State court. On May 31, 1988, such petitions were filed and removal was effected. By June 1, 1988 Order of this Court in the *Yonkers* case, the United States of America and the Yonkers Branch of the National Association for the Advancement of Colored People (NAACP), plaintiff and plaintiff-intervenor in that case, were added as defendants in each of these actions.

On June 8, 1988, this Court denied the motions of the plaintiffs to remand these actions to the State court. In so ruling, this Court indicated that removal of these actions was proper pursuant to the All Writs Act, 28 U.S.C. § 1651, and federal removal statutes.[1]

On June 8, 1988, following extensive briefing by all parties, this Court heard argument on the merits of St. Joseph's and the Raceway's claims against Yonkers. Such briefing and argument has rendered the issues in these actions clearly focused and readily resolvable. Accordingly, the following constitutes the Opinion and Order of this Court:

Contrary to the claims of St. Joseph's and the Raceway, the City of Yonkers, in a very real sense, *is* faced

---

[1] This Court found that removal of the St. Joseph's action was proper pursuant to 28 U.S.C. §§ 1441 and 1443, and that removal of the Yonkers Racing Corporation action was proper pursuant to 28 U.S.C. § 1443.

with an emergency. The question of the designation of sites for 200 units of public housing, as required by the Consent Decree, simply must come to an end. This resolution, however, should not prejudice the rights of the property owners before this Court. This Court seeks expedition of the remedial process in the *Yonkers* case, but not at the expense of such rights.

There are essentially three claims raised in the papers filed by the Archdiocese and Yonkers Raceway. First, both the Archdiocese and the Raceway allege that the eminent domain proceedings initiated by Yonkers violate New York State Eminent Domain Procedure Law (EDPL), in that St. Joseph's and the Raceway were deprived of rights which exist under the EDPL with respect to notice, hearing and review. The Court agrees with the City of Yonkers, the United States and the NAACP in their contention that there exists either exemption from such notice, hearing and review provisions under State law or that there has been such substantial compliance with the purposes of such notice and review provisions that State policy must give way when it operates to prevent the vindication of Constitutional guarantees. *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45 (1971). The process by which the public housing sites designated in the Consent Decree were determined, the notoriety of that process, the review already given to those sites and the continuing review of those sites by HUD certainly satisfied the substance of the State law provisions upon which St. Joseph's and the Raceway predicate their claims. This Court agrees with the argument made by the City of Yonkers that what is contemplated by the State law is that there be a review of the environmental and other issues raised, but not duplicative review.

Second, both St. Joseph's and the Raceway challenge the City's actions as violative of the requirements of the New York State Environmental Quality Review Act

(SEQRA). This Court finds that, with respect to environmental issues, the purpose of this State law is that there be a meticulous inquiry into all appropriate factors that will impact on a community before the taking of certain actions should be allowed. Such an inquiry has certainly been conducted here. In any event, SEQRA regulations operate in a fashion which clearly exempts the actions which are the subject of these proceedings from the requirements of that State law. See Section 617.2(q) New York Code of Rules and Regulations.

Finally, St. Joseph's has alleged that the taking of its property by the City would violate its constitutional right to the free exercise of religion. Much of this Court's response to that contention is set forth in its comments at the hearing in these actions concerning the varying positions of the Archdiocese with respect to inclusion of its property as a site for the construction of public housing. On January 25, 1988, the Archdiocese expressed clear support for such an effort and offered to donate additional Seminary land for recreational use by public housing residents. On March 21, 1988, the Archdiocese stated concerns about particular aspects of the public housing plan but still indicated an intent to proceed with the plans for the Seminary site. On April 23, 1988, Cardinal O'Connor stated that the housing plan was "fatally flawed" and that the proposed use of the site was being reconsidered. This position has now come full circle in that St. Joseph's has filed this action to prevent condemnation of its property and has alleged at the last minute a previously unstated claim of religious use for the parcel in question.

The process by which the Seminary site was included in the Consent Decree has been fully spelled out in this record. As noted above, the response of the Archdiocese to the suggestion that the St. Joseph's Seminary site be included as one of the public housing sites was at first a positive and affirmative one, on which there was sub-

stantial reliance placed by all parties to that document. Following that response, the Consent Decree was consummated. Entry of the Consent Decree led to the lifting of the freeze on private development in the City of Yonkers imposed by this Court in November 1987, the removal of the threat of bankrupting fines and a step forward to the eventual vindication of the constitutional and statutory violations found by this Court in its *Yonkers* liability opinion, overwhelmingly affirmed "in all respects" by the United States Court of Appeals for the Second Circuit.

Indeed, the first significant suggestion, after three months of dialogue or attempted dialogue on this matter, that the taking of the Seminary property was an interference with the free exercise rights of the Archdiocese, is contained in the Affidavit of Monsignor O'Brien, Rector of St. Joseph's Seminary, provided to this Court, Yonkers, the United States and the NAACP at 5:00 p.m. on June 7, the day before the hearing in these actions. In that affidavit, Monsignor O'Brien speaks of the interference with the pastoral contemplative setting of the Seminary which would result if 2 acres of the 44 acre Seminary site is taken for public housing. However, as oral argument by counsel for the Archdiocese has indicated, even that is equivocated, because the Court has been told that if an overall public housing plan was accepted or supported by the Archdiocese, it might then be willing to make the Seminary site available consistent with the view it first expressed on January 25th. So that, in essence, the claim that is made is that, if there were agreement by the Archdiocese with the overall plan, it could allow the use of this property and that would not interfere with free exercise rights; but since the Archdiocese has reservations, to date unarticulated, with respect to the overall plan, it is resisting the taking on free exercise grounds.

In any event, the entire issue is not whether the two acres at the extremity of the over 40-acre Seminary site near the intersection of two roads can be said to serve some religious purpose. This Court agrees with the NAACP's contention that the question of religious use is only the *beginning* of the inquiry with respect to First Amendment issues. Even if the Court were to accept, *arguendo*, despite the belatedness of the claim, the Archdiocese's allegation of religious use, the inquiry then becomes a balancing one. There is a need here to vindicate the federal constitutional rights of those citizens of Yonkers who have for years been denied housing opportunities in the fashion set forth at painful length in this Court's liability opinion in *Yonkers*. The fact that the inclusion of the Seminary property in the Consent Decree is an integral part of that Decree and, therefore, an essential component in the efforts to vindicate those important rights, has been amply demonstrated during the arguments of the parties herein. The Court therefore finds that no valid claim of interference with free exercise rights under the First Amendment has been advanced.

With further respect to the claims of the Raceway, the Court finds that there has been no documentation of its claim made in oral argument that the parking lot site is essential to the operation of the Raceway. This Court rejects such claim.

Accordingly, it is hereby ORDERED that the petitions of St. Joseph's Seminary and the Yonkers Racing Corporation for relief pursuant to Article 78 of the New York CPLR be and are hereby denied in all respects and these actions are dismissed. It is further ORDERED that St. Joseph's and the Raceway shall forthwith each serve on the State court in the pending eminent domain proceedings against their properties a copy of this Order and present to such Court a proposed order stating that, insofar as all substantive grounds for objection to the pro-

ceedings in question have been fully litigated and resolved in this Court, the City of Yonkers' petitions in those actions should be granted and the eminent domain proceedings shall go forward in accordance with State law in order to determine the sole remaining issue of valuation of St. Joseph's and the Raceway's properties.

SO ORDERED:

/s/ Leonard B. Sand
LEONARD B. SAND, U.S.D.J.

DATE: June 13, 1988

APPENDIX C

TABLE OF STATUTES

28 U.S.C. § 1441

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C. § 1443

§ 1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United

States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusal to do any act on the ground that it would be inconsistent with such law.

28 U.S.C. § 1651

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Eminent Domain Procedure Law Of The State of New York

§ 201. Public hearings

Except as provided herein, prior to acquisition, the condemnor, in order to inform the public and to review the public use to be served by a proposed public project and the impact on the environment and residents of the locality where such project will be constructed, shall conduct a public hearing in accordance with the provisions of this article at a location reasonably proximate to the property which may be acquired for such project.

§ 202. Notice

(A) Where a public hearing is required by this article the condemnor shall give notice to the public of the purpose, time and location of its hearing setting forth the proposed location of the public project including any proposed alternate locations, at least ten but no more than thirty days prior to such public hearing by causing such notice to be published in at least five successive issues of an official daily newspaper if there is one designated in the locality where the project will be situated and in at least five successive issues of daily newspaper of general circulation in such locality. If the official newspaper is one of general circulation in such locality, publication therein as specified shall be deemed sufficient compliance.

(B) In the event that the only newspaper available in such locality is a weekly publication the above described notice shall be published in such newspaper in at least two successive issues.

(C) Inadvertent failure to notify a person or persons entitled to notice under this section shall not be jurisdictional nor construed to affect the validity of any title acquired by a condemnor under this law.

§ 203. Conduct of the public hearing

At the public hearing the condemnor shall outline the purpose, proposed location or alternate locations of the public project and any other information it considers pertinent, including maps and property descriptions of the property to be acquired and adjacent parcels. Thereafter, any person in attendance shall be given a reasonable opportunity to present an oral or written statement and to submit other documents concerning the proposed public project. A record of the hearing shall be kept, including written

statements submitted. Copies of such record shall be available to the public for examination without cost during normal business hours at the condemnor's principal office and the office of the clerk or register of the county in which the property proposed to be acquired is located. Copies shall be reproduced upon written request and payment of the cost thereof. Further adjourned hearings may be scheduled.

§ 204. Determination and findings

(A) The condemnor, within ninety days after the conclusion of the public hearings held pursuant to this article, shall make its determination and findings concerning the proposed public project and shall publish a brief synopsis of such determination and findings in at least two successive issues of an official newspaper if there is one designated in the locality where the project will be situated and in at least two successive issues of a newspaper of general circulation in such locality. If the official newspaper is one of general circulation in such locality, publication therein as specified shall be deemed sufficient compliance. The synopsis shall include those factors set forth in subdivision (B) herein, and shall also state that copies of the determination and findings will be forwarded upon written request without cost.

(B) The condemnor, in its determination and findings, shall specify, but shall not be limited to the following:

(1) the public use, benefit or purpose to be served by the proposed public project;

(2) the approximate location for the proposed public project and the reasons for the selection of that location;

(3) the general effect of the proposed project on the environment and residents of the locality;

(4) such other factors as it considers relevant.

§ 206. Exemptions

The condemnor shall be exempt from compliance with the provisions of this article when:

(A) Pursuant to other state, federal, or local law or regulation it considers and submits factors similar to those enumerated in subdivision (B) of section two hundred four, to a state, federal or local governmental agency, board or commission before proceeding with the acquisition and obtains a license, a permit, a certificate of public convenience or necessity or other similar approval from such agency, board or commission or;

(B) Pursuant to article VII or article VIII of the public service law it obtained a certificate of environmental compatibility and public need or;

(C) Pursuant to other law or regulation it undergoes or conducts or offers to conduct prior to an acquisition one or more public hearings upon notice to the public and owners of property to be acquired, and provided further that factors similar to those enumerated in subdivision (B) of section two hundred four herein may be considered at such public hearing, or;

(D) When in the opinion of the condemnor the acquisition is de minimis in nature so that the public interest will not be prejudiced by the construction of the project or because of an emergency situation the public interest will be endangered by any delay caused by the public hearing requirement in this article.

(E) When it complies with the procedures contained in section 41.34 of the mental hygiene law.

§ 207. Judicial review

(A) Any person or persons jointly or severally, aggrieved by the condemnor's determination and findings made pursuant to section two hundred four of this article, may seek judicial review thereof by the appellate division of the supreme court, in the judicial department embracing the county wherein the proposed facility is located by the filing of a petition in such court within thirty days after the condemnor's completion of its publication of its determination and findings pursuant to section two hundred four herein. Such petition shall be accompanied by proof of service of a demand on the condemnor to file with said court a copy of a written transcript of the record of the proceeding before it, and a copy of its determination and findings. Upon receipt of such petition and demand, the condemnor shall forthwith deliver to the court a copy of the record and a copy of its determination and findings. The proceeding shall be heard on the record without requirement of reproduction. If such proposed public improvement is located in more than one judicial department such proceeding may be brought in any one, but only one of such departments and all such proceedings with relation to any single public project shall be consolidated with that first filed.

(B) The jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final subject to review by the court of appeals in the same manner and form and with the same effect as provided for appeals in a special proceeding. All such proceedings shall be heard and determined by the appellate division of the supreme court, and by the court of appeals, as expeditiously as possible and with lawful preference over other matters.

(C) The court shall either confirm or reject the condemnor's determination and findings. The scope of review shall be limited to whether:

(1) the proceeding was in conformity with the federal and state constitutions,

(2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority,

(3) the condemnor's determination and findings were made in accordance with procedures set forth in this article, and

(4) a public use, benefit or purpose will be served by the proposed acquisition.

New York State Environmental Quality Review Act, 6 NYCRR §§ 617, *et seq.*

617.2(q) Exempt actions means any one of the following:

(1) civil or criminal enforcement proceedings, whether administrative or judicial, including a particular course of action specifically required to be undertaken pursuant to a judgment or order, or the exercise of prosecutorial discretion;

617.6 Establishment of lead agency and determination of significance.

(a) Lead agency procedures when a single agency is involved:

(1) An agency will be lead agency when it proposes to undertake or receives an application for funding or approval of a Type I or unlisted action that does not involve another agency.

(i) if the agency is directly undertaking the action, it shall determine the significance of the action as early as possible in the design or formulation of the action; and

(ii) if the agency has received an application for funding or approval of the action, it shall determine the significance of the action with 20 calendar days of its receipt of the application, an EAF, or any additional information reasonably necessary to make the determination.

APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

Index No. 5645/88

IN THE MATTER OF THE PROCEEDINGS PURSUANT TO THE NEW YORK EMINENT DOMAIN PROCEDURE LAW BY THE CITY OF YONKERS,
Petitioner-Condemnor,

-against-

YONKERS RACING CORPORATION, PEOPLE OF THE STATE OF NEW YORK, CITY OF NEW YORK, NEW YORK STATE DEPARTMENT OF LABOR,

THE OWNERS AND OTHER CONDEMNEES OF THE PARCELS OF REAL PROPERTY KNOWN AS SECTION 6, BLOCK 6118, LOT(S) 1-23 ON THE OFFICIAL TAX MAP OF THE CITY OF YONKERS, NEW YORK,
Respondents-Condemnees,

in regard to a public taking pursuant to the First Remedial Consent Decree in Equity entered January 28, 1988 in the United States District Court for the Southern District of New York in the matter entitled, "United States of America, et al. v. City of Yonkers, et al.", 80 CIV 6761 (LBS).

ANSWER

Respondent, Yonkers Racing Corporation, by its attorneys, Bleakley & Schmidt, as and for its answer to the verified petition, respectfully alleges:

1. Denies each and every allegation contained in paragraph 2 of the verified petition except admits the existence of the FIRST REMEDIAL CONSENT DECREE IN EQUITY and begs leave to refer to said Decree for a true and accurate statement of its contents.

2. Denies each and every allegation contained in paragraph 3 of the verified petition except admits, to the extent relevant, the existence of certain decisions and orders referred to therein and the failure of the petitioner to comply with the terms of said decisions and orders and, specifically, denies that petitioner is exempt from the provisions of Article 2 of the Eminent Domain Procedure Law.

3. Denies knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraphs 4 and 5 of the verified petition.

4. Denies each and every allegation contained in paragraph 7 of the verified petition except admits that Yonkers Racing Corporation is the fee owner of the property sought to be acquired.

5. Denies knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 8 of the verified petition.

6. Denies each and every allegation contained in paragraph 9 of the verified petition.

7. Denies knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 10 of the verified petition.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE, RESPONDENT ALLEGES

8. Petitioner has failed to comply with the notice and hearing requirements of Article 2 of the Eminent Domain Procedure Law.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, RESPONDENT ALLEGES

9. Petitioner has failed to comply with the provisions of Article 8 of the Environmental Conservation Law and the regulations promulgated thereunder in that no determination of environmental significance was made prior to the commencement of this proceeding.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE, RESPONDENT ALLEGES

10. Petitioner's failure to comply with the notice and hearing requirements of Article 2 of the Eminent Domain Procedure Law may have illegally precluded respondents from raising the issues available in a proceeding before the Appellate Division under Section 207 of the Eminent Domain Procedure Law and, specifically, whether the proposed taking is in conformity with the federal and state constitutions, whether the proposed acquisition is within the condemnor's statutory, jurisdiction or authority, whether the actions of petitioner are taken in good faith, whether the condemnor's determination and findings were made in accordance with the procedures set forth in Article 2 of the EDPL, the reasons for the selection of the subject property and the effect of the proposed project on the environment and residents of the locality and whether a public use, benefit or purpose will be served by the acquisition.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE, RESPONDENT ALLEGES

11. The proposed condemnation of petitioner's property is arbitrary, capricious and unreasonable and not supported by substantial evidence and is, therefore, illegal, null and void.

WHEREFORE, respondent demands judgment dismissing the within proceeding together with its costs and

disbursements and such other and further relief as may be just, proper and equitable.

Dated: White Plains, New York
May 11, 1988

BLEAKLEY & SCHMIDT
Attorneys for Respondent
YONKERS RACING CORPORATION
Office & P.O. Address
123 Main Street
White Plains, New York 10601
(914) 949-2700

STATE OF NEW YORK)
) ss:
COUNTY OF WESTCHESTER)

TIMOTHY J. ROONEY, being duly sworn, deposes and says:

I am the President of Yonkers Racing Corporation. I have read the foregoing answer and know the contents thereof. The same is true to my knowledge, except as to those matters stated therein to be made on information and belief, and as to those matters I believe them to be true.

/s/ Timothy J. Rooney
TIMOTHY J. ROONEY

Sworn to before me this
18th day of May, 1988

/s/ Thelma Knarr
Notary Public

APPENDIX E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

Index No. ————

IN THE MATTER OF THE APPLICATION OF
YONKERS RACING CORPORATION,
Petitioner,

-against-

THE CITY OF YONKERS,
Respondent.

For a judgment pursuant to Article 78 of the Civil Practice Law and Rules to review a determination by respondent to condemn real property owned by petitioner.

PETITION

The petition of Yonkers Racing Corporation, by its attorneys, Bleakley & Schmidt, respectfully alleges:

1. Petitioner is a New York corporation duly organized and existing under and by virtue of the laws of the State of New York. Petitioner is the owner of the real property described on Exhibit "1" annexed hereto.

2. Defendant, City of Yonkers, is a municipal corporation duly organized and existing under and by virtue of the laws of the State of New York.

3. This petition is brought to obtain a judgment that a proposed condemnation of property owned by the petitioner is unconstitutional, illegal, null and void.

ALLEGATIONS COMMON TO ALL CLAIMS

4. Upon information and belief, on April 22, 1988, respondent filed a notice of pendency of a proceeding to acquire the subject property by condemnation in the Office of the Clerk of the County of Westchester. A copy of said notice is annexed hereto as Exhibit "2". On or about April 22, 1988, respondent served a notice of petition and petition (Exhibit "3") upon, *inter alia*, petitioner.

5. The petition seeks an order pursuant to Section 402(B)(5) of the Eminent Domain Procedure Law directing that an acquisition map be filed in order to effectuate the vesting of title to the subject property in the City of Yonkers for the stated purpose of facilitating the construction of 20 units of low income housing.

6. The acquisition of petitioner's property purports to be in compliance with an order issued by the United States District Court for the Southern District of New York (Sand, J.) in an action entitled *United States of America, et. al. v. City of Yonkers, et. al.*, 80 Civ. 6761 (LBS) entered on or about May 28, 1986, a further order of the same Court dated July 1, 1987 and a recent order of the same Court entitled FIRST REMEDIAL CONSENT DECREE IN EQUITY dated January 25, 1988 (Exhibits "4", "5" and "6" annexed hereto).

7. Under and pursuant to the aforesaid orders, the City of Yonkers was directed to, inter alia, provide sites for the construction of 200 units of public housing. Despite the aforesaid repeated orders of the District Court to comply with a consent decree entered into between the City and the Department of Housing and Urban Development dated March 19, 1984, a period in excess of four (4) years, respondent failed, within each and every time period set for compliance by the Court, to take the action required to designate and acquire property for the construction of public housing units.

8. Prior to the commencement of the proceeding to condemn petitioner's property, no notice of public hearing was published, no public hearing was held, no determination and findings were made by the City Council of the City of Yonkers with respect to the condemnation of the subject property and no environmental review of the proposed action was made.

AS AND FOR A FIRST CAUSE
OF ACTION, PETITIONER ALLEGES

9. The respondent was required, under Article 2 of the Eminent Domain Procedure Law, to hold a public hearing on notice and, thereafter, to make a determination and findings as to the proposed condemnation.

10. Respondent's failure to comply with the public hearing requirements of Article 2 are purportedly excused in the petition for condemnation by the statement that:

> ". . . it is the opinion of the Petitioner-Condemnor that this is an emergency situation in which the public interest will be endangered by any delay caused by compliance with the normal requirements of Article 2 of the Eminent Domain Procedure Law."

11. Respondent has been under an order of the United States District Court since May 28, 1986 to provide sites for publicly assisted housing. However, as found by an order of the United States District Court (Sand, J.) dated July 1, 1987 (Exhibit "5"):

> "The City of Yonkers has failed to take many of the actions required by the Housing Remedy Order. Instead, the City has delayed meaningful remedial action and declined repeated opportunities accorded to the City to act itself in the first instance in taking remedial action."

12. On or about December 8, 1987, pursuant to the direction of the United States District Court, an Outside Housing Advisor appointed by the District Court delivered to the Court and the parties to the litigation a list (Exhibit "7") of nine privately owned sites which the City might acquire in whole or in part to construct a portion of the 200 public housing units. The subject property was included in this list.

13. By the execution of the FIRST REMEDIAL CONSENT DECREE IN EQUITY on January 25, 1988, the City agreed to seek to acquire the subject property and, by resolution of the City Council of the City of Yonkers on January 27, 1988, the City Council approved the consent decree.

14. Section 201 of the Eminent Domain Procedure Law provides:

> Except as provided herein, prior to acquisition, the condemnor, in order to inform the public and to review the public use to be served by a proposed public project and the impact on the environment and residents of the locality where such project will be constructed, shall conduct a public hearing in accordance with the provisions of this article at a location reasonably proximate to the property which may be acquired for such project."

15. Section 202 of the EDPL provides that notice of the public hearing shall be given at least ten (10) but no more than thirty (30) days prior to such public hearing by publication in the official daily newspaper of the condemnor.

16. Section 204 of the Eminent Domain Procedure Law provides that, within 90 days after the conclusion of the public hearing, the condemnor shall make its determination and findings concerning the proposed public project and shall specify in such findings the following:

"(1) The public use, benefit or purpose to be served by the proposed public project;

(2) the approximate location for the proposed public project and the reasons for the selection of that location;

(3) the general effect of the proposed project on the environment and residents of the locality;

(4) such other factors as it considers relevant."
[EDPL Section 204(B)(1-4)].

17. Although respondent has been aware since at least December 8, 1987 that the subject property was one of the potential sites for condemnation, and although respondent's attorneys executed the FIRST REMEDIAL CONSENT DECREE IN EQUITY on January 25, 1988 which specifically designated the subject property as a site for acquisition, no public hearing on the proposed condemnation was either noticed or held.

18. The above referred to provisions of Section 202 of the Eminent Domain Procedure Law, which require that notice of the public hearing may be given as little as ten days prior to the public hearing, afforded ample opportunity to the City of Yonkers to publish such notice, hold the public hearing and make its determination and findings in accordance with Section 204 of the EDPL. The City of Yonkers waited from January 25, 1988 until April 25, 1988, a period of 90 days, to commence the within proceeding. During that period, the public hearing required by Article 2 of the Eminent Domain Procedure Law could have been timely noticed, held and a determination and findings made in accordance with lawful procedures.

19. Adherence to the notice and hearing requirements of the EDPL would not have, in any way, delayed the commencement of this condemnation.

20. By reason of the aforesaid, no emergency situation which would endanger the public interest exists and respondent was required by law to conduct a public hearing on the proposed condemnation of the subject property upon proper notice and in accordance with Article 2 of the Eminent Domain Procedure Law.

AS AND FOR A SECOND CAUSE
OF ACTION, PETITIONER ALLEGES

21. Section 207 of the Eminent Domain Procedure Law provides for direct judicial review of the Appellate Division of the Supreme Court of the State of New York from the determination and findings made pursuant to Section 204 of the EDPL.

22. Because of the respondent's failure to conduct a public hearing and make the determination and findings as required by Section 204(B)(1-4), petitioner may be precluded from the opportunity of contesting, *inter alia*, the good faith of the respondent in selecting the subject property by direct appeal to the Appellate Division, Second Department.

23. Petitioner has, therefore, been denied its right to due process in the condemnation of its property.

AS AND FOR A THIRD CAUSE
OF ACTION, PETITIONER ALLEGES

24. Upon information and belief, the subject property is located in an "T" zoning district which permits, as a principal use, the construction of two family homes. The current zoning does not permit more intensive multi-family development.

25. The proposed condemnation is to facilitate the construction of 20 multi-family units on the subject property.

26. Under the Environmental Conservation Law (Article 8) and the Regulations promulgated thereunder (6 NYCRR Part 617), the type of action contemplated is an Unlisted Action.

27. Pursuant to the provisions of Part 617.6 of the aforesaid Code of Rules and Regulations, a determination of the significance of the action contemplated for the subject property is and was required to have been made by the City Council for the City of Yonkers, or such other lead agency as appropriately designated, prior to the commencement of this proceeding.

28. Respondent failed to follow any of the procedures mandated by Article 8 of the Environmental Conservation Law and 6 NYCRR Part 617 and, specifically, respondent failed to designate a lead agency or make any determination of the environmental significance of the contemplated action. As a consequence, the proposed condemnation of this property is illegal, null and void.

AS AND FOR A FOURTH CAUSE
OF ACTION, PETITIONER ALLEGES

29. The construction of 20 units of multi-family housing on the subject property is part of the first of two phases of development in the City of Yonkers pursuant to consent decrees entered and to be entered in the litigation pending in the United States District Court for the Southern District of New York.

30. The first phase of construction is to be 200 units of public housing on sites located in various portions of the City most of which, upon information and belief, are not currently zoned for multi-family development.

31. The second phase of development will be the construction of 800 units of assisted housing by private developers who apply for and are granted zone changes on parcels throughout the City of Yonkers not presently zoned for multi-family use.

32. Upon information and belief, Phase II of the development contemplates that these 800 units of assisted housing will be built in conjunction with market rate multi-family housing; with approximately 20 percent of the total number of units to be constructed set aside for the assisted housing. Consequently, the total number of units to be constructed in order to provide for the allocation of 800 assisted housing units will be approximately 4,000 multi-family units; which are to be built largely on properties not currently zoned for multi-family use. A total number of multi-family housing units, therefore, to be constructed in the City of Yonkers on land in large part not currently zoned for multi-family use over the next five years is approximately 4,200 units.

33. The construction of 4,200 multi-family units on property in the City of Yonkers in large part not currently zoned for multi-family use constitutes, upon information and belief, by far the largest proposed development in the history of the City of Yonkers.

34. Upon information and belief, prior to the execution of the FIRST REMEDIAL CONSENT DECREE IN EQUITY, the selection of the subject property, the selection of the additional sites for the first 200 units of public housing and the execution of the second decree providing for the additional approximately 4,200 units of multi-family housing, no environmental assessment of the impact of this development has been undertaken by the City of Yonkers or by any affected agency either on a site specific basis or generically and, therefore, respondent proposes to either build or authorize the construction of approximately 4,200 units of multi-family housing without complying with any of the procedures set forth in the Environmental Conservation Law and the regulations promulgated thereunder.

WHEREFORE, petitioner demands judgment that the proposed condemnation of the subject property is uncon-

stitutional, illegal, null and void and a further judgment enjoining the respondent, City of Yonkers, from taking any action to acquire the subject property, for cancellation of the notice of pendency relative to the subject property heretofore filed by the City of Yonkers and for a dismissal of the condemnation proceeding on its merits and such other and further relief as may be just, proper and equitable.

Dated: White Plains, New York
May 17, 1988

YONKERS RACING CORPORATION
By: /s/ [Illegible]

STATE OF NEW YORK)
) ss:
COUNTY OF WESTCHESTER)

TIMOTHY J. ROONEY, being duly sworn, deposes and says:

I am the President of Yonkers Racing Corporation. I have read the foregoing petition and know the contents thereof. The same is true to my knowledge, except as to those matters stated therein to be made on information and belief, and as to those matters I believe them to be true.

/s/ Timothy J. Rooney
TIMOTHY J. ROONEY

Sworn to before me this
day of May, 1988

/s/ Thelma Kann
Notary Public

APPENDIX F

SECOND CIRCUIT DIGEST

Summaries of Principal Opinions of the United States Court of Appeals for the Second Circuit

Published monthly during the court year by the

Federal Bar Council, 145 East 49th Street, New York, N.Y. 10017

Editor: Prof. Mark Davies

Second Circuit Digest No #124—October 1988

* * * *

JURISDICTION—In exceptional circumstances, the All Writs Act, 28 U.S.C. § 1651, may be used to effectuate removal of a case from state court.

Pursuant to a Consent Decree reached between the City of Yonkers, the United States, and the Yonkers chapter of the NAACP in a housing desegregation case pending in federal district court, the City of Yonkers initiated, under pain of contempt, proceedings in New York State court to condemn housing sites owned by Yonkers Racing Corporation and St. Joseph's Seminary and College. The Raceway and the Seminary then filed separate petitions against the City in state court, pursuant to N.Y. CPLR art. 78, seeking to enjoin the condemnation of their respective properties. The district court ordered the City to remove the article 78 proceedings to the district court and subsequently denied the Raceway's and the Seminary's motions to remand and dismissed their article 78 petitions on the merits.

On appeal, the Circuit Court affirmed, except with regard to the Seminary's First Amendment challenge to the taking of its property, which the Court of Appeals remanded to the district court for further consideration. *I. Jurisdiction. A. Removal Statutes.* The Court of Appeals first considered whether the City of Yonkers was

correctly deemed by the district court to be a defendant for removal purposes under 28 U.S.C. §§ 1441 (general removal statute) and 1443 (civil rights removal statute), which permit removal only by defendants. In light of *Mason City & Fort Dodge R.R. v. Boynton*, 204 U.S. 570 (1907), and *Chicago, Rock Island & Pac. R.R. v. Stude*, 346 U.S. 574 (1954), which held that federal law determines who is the plaintiff and who the defendant for removal purposes and that a condemnee is a defendant for purposes of federal removal statutes, the Court of Appeals had serious doubts whether the removal statutes provided a proper basis to compel the City of Yonkers to remove the article 78 proceedings to federal court. However, the Court did not have to resolve that difficult question since the district court had asserted an independent basis for removal jurisdiction under the All Writs Act.

B. The All Writs Act. That Act provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Court of Appeals rejected the Raceway's and the Seminary's contention that the federal removal statutes are the exclusive sources of removal jurisdiction, noting that in *Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34 (1985), the Supreme Court expressly left open the question of the availability of the All Writs Act in exceptional circumstances to issue the writ when traditional statutory procedures clearly are inadequate. Here the Raceway and the Seminary were in a position—whether willingly or not—to frustrate implementation of the Consent Decree. This is just the sort of extraordinary circumstances envisioned by the All Writs Act. The Second Circuit has previously held that the All Writs Act enables a federal court in an exceptional case to exercise its residual jurisdictional authority to issue orders against non-parties to a civil rights

action in order to vindicate the constitutional rights of existing parties. Although in retrospect the assertion by the district court of jurisdiction in the first instance over the condemnation of the Raceway's and the Seminary's properties might have been the better course of action, as a practical matter the Court of Appeals saw no reason why it was any less "necessary or appropriate" at this stage of the proceedings to invoke the authority of the All Writs Act. Moreover, were the Court of Appeals to decide that removal was improper under the All Writs Act, the state court would be faced with a situation in which any order it issued that was inconsistent with the Consent Decree would be subject to the injunctive powers of the federal court under the exception provisions of the Anti-Injunction Act, 28 U.S.C. § 2283. Use of the All Writs Act in this case to effectuate removal thus seemed to the Court of Appeals to be a less drastic, and therefore preferable, result. "In sum, we agree with the district court that this is indeed an exceptional case. Accordingly, "we hold that removal was proper under the All Writs Act. We do so because removal was necessary to protect the integrity of the Consent Decree and because the issues raised by the Article 78 petitions cannot be separated from the relief provided by the Consent Decree." The Court of Appeals therefore concluded that, because of the significant risk of inconsistent decrees from two courts, it was "necessary or appropriate" for the district court to invoke the residual jurisdictional authority of the All Writs Act.

II. The Merits of the Article 78 Petitions. A. EDPL. The Court of Appeals further concluded that the "emergency situation" provision of New York's Eminent Domain Procedure Law (EDPL) exempted the City from compliance with the procedural requirements of the EDPL. Moreover, there was substantial compliance with the requirements of the EDPL in this case; given the undisputed public purpose inherent in the implementation

of the Housing Remedy Order and the nature and extent of the review process during extensive proceedings before the district court, there was a valid determination that the proposed condemnations would be in the public interest as required under article 2 of the EDPL. *B. SEQRA.* The Court of Appeals also agreed with the district court that the proposed condemnations of the Raceway and the Seminary sites were exempt from compliance with the provisions of the New York State Environmental Quality Review Act (SEQRA) as actions "required to be undertaken pursuant to a judgment or order" and for "actions . . . of any court" (6 NYCRR § 617.2(q)(1), (5)); in any event, HUD was in the process of conducting an environmental review of the proposed housing sites pursuant to the National Environmental Policy Act (NEPA). *C. The First Amendment.* The Court of Appeals determined, however, that the proposed taking of the Seminary's property raised a significant question under the First Amendment. When, as was claimed in this case, a proposed governmental action would substantially affect the practice of religion, there exists at least a material issue of fact concerning whether the state has interfered with the free exercise of religion. For purposes of the appeal, the Court accepted as true the Archdiocese's allegations that the taking of the Seminary site would substantially affect the work at St. Joseph's and that the site is essential to the Seminary's mission. It is well settled that a limitation by the government on the free exercise of religion is permitted only when the state can demonstrate that a compelling interest justifies the restriction and that no alternative means of accomplishing the state's compelling interest are available. The Court of Appeals did not agree that inclusion of the Seminary property in the Consent Decree was necessarily essential to the implementation of the Housing Remedy Order. Political expediency—the City's contention that there are no polit-

ically acceptable alternative sites—is far from a compelling reason to force the Seminary to give up its property in derogation of a constitutional right. Consequently, assuming, as the Court did for purposes of the appeal, that the taking otherwise impermissibly burdened the Seminary's free exercise rights, the Seminary was entitled to be heard on the issue whether the taking was necessary to vindicate a compelling state interest.

Dissenting, Judge Mahoney concluded that the article 78 proceedings were improperly removed and should be remanded to the state court. As to the general and civil rights removal statutes, both allow removal only by a "defendant"; and the Supreme Court has twice held that, whatever labels state law may apply, a condemnee is a defendant for purposes of federal removal statutes. With respect to the All Writs Act, *Pennsylvania Bureau of Correction*, cited by the majority, articulates the basic rule that where, as in the case of removal, a federal statute "specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although the Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." 106 S. Ct. at 361. It is apparent that the removal undertaken by the district court here and approved by the majority was not warranted by the All Writs Act. *Yonkers Racing Corp. v. City of Yonkers;* ## 88-6140, 88-6146; 9/22/88; *Altimari* and Mahoney, Circuit Judges; Korman, United States District Judge for the Eastern District of New York, sitting by designation.

APPENDIX G

PORTIONS OF TRANSCRIPT OF JUNE 8, 1988
HEARING 1 (Pages 317a-466a)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

80 Civ 6761 LBS

UNITED STATES OF AMERICA
Plaintiff,

and

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Plaintiff-Intervenors,

against

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,
Defendants

June 8, 1988
10:00 a.m.

Before:

HON. LEONARD B. SAND
District Judge

(In open court)

THE COURT: We have a number of matters on the docket. Motion to remand, the Article 78 on the merits and Yonkers motion to vacate the consent decree on grounds of mutual mistake, the adoption of the long-term plan and the appointment of the executive director

called for by the long-term plan. Listing that number of matter on my

* * * *

MR. MEADE: Only and Mr. Frederick Martin will speak on behalf of Yonkers. Thank you.

THE COURT: Mr. Martin?

MR. MARTIN: Your Honor, based on comments that you made at the beginning of this proceeding concerning the scheduling and the time and the time which you are prepared to devote to this, I am most cognizant of not being repetitious if I can avoid it, and certainly my arguments with respect to Yonkers Raceway, a privately owned property in Yonkers, which is one of the designated sites, which has been made the subject of a condemnation proceeding in West Chester County, I would endorse, repeat and reargue all of the points that have already been made by Mr. Meade, and would ask that your Honor consider those and that you consider the brief which we have submitted which contains those.

THE COURT: I have read all briefs. I have read everything submitted in this case.

MR. MARTIN: I think the only additional issue that I wish to address at this time is probably the most significant from Yonkers Raceway's point of view, and that is that there is no federal question involved in the Article 78 proceeding, which Yonkers has commenced, Yonkers Raceway that is, commenced in this proceedings to review the attempted condemnation by the city.

And I say that with all due respect and understanding full well the points that your Honor has made consistently this morning about the overriding importance of the discrimination decree, and the discrimination determination which your Honor has made, and the questions of time and all of those items which I do not belittle or suggest should be belittled in any respect.

On the other hand, your Honor, Yonkers Raceway is before the judiciary in this matter for the first time. We have not been accused of discriminating against anyone, and we are here for the purpose of asserting our rights in a proceeding which has been brought against us by the City of Yonkers and pursuant to a decree of this court.

THE COURT: And you are entitled to a hearing on the merits before a judicial officer and the opportunity to make your views known and considered. That is not the issue. No one is questioning that. The only question is the former.

MR. MARTIN: Your Honor, that is the issue. The issue is whether we are entitled to notice and a hearing before a legislative body.

THE COURT: That is the Article 78 on the merits. I thought you were arguing the motion on remand.

MR. MARTIN: Excuse me, your Honor. They do tend to overlap.

THE COURT: Yes.

MR. MARTIN: But the basic issue, your Honor, is that in a remand and on the basis of this argument, which is an argument in response to a petition filed in this court to bring the case here, this court does not have subject matter jurisdiction of the only litigation in which Yonkers Raceway is involved in this matter.

And that's our principal argument as well as all of those which Mr. Meade has reiterated with respect to the defendant's removal, partial removal of proceedings, and rights of owners and nonparties in the discrimination action.

We are not parties to that action. When the government acts, your Honor, there are precious few prerogatives which remain to an individual property owner, but we wish to defend each one of those prerogatives to the full extent that we are permitted by law.

Thank you, your Honor.